IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1366

ANA MARIA CARDONA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves a Rule 3.850 motion on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the Brief shall be as follows:

(R. ___) -- Record on Direct appeal;

(PCR. ___) -- Record in this instant appeal;

(Supp. PCR. ___) -- Supplemental Record in this instant appeal.

References to the exhibits introduced during the hearing and other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Ms. Cardona requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, give the seriousness of the claims involved and the stakes at issue.

STATEMENT OF FONT

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STATEMENT OF THE CASE AND OF THE FACTS

On January 11, 1990, Ana Cardona and co-defendant Olivia Gonzalez Mendoza were indicted and charged with first-degree murder and aggravated child abuse for the death of Ms. Cardona's son, Lazaro Figueroa. Attorney Bruce H. Fleisher was appointed to represent Gonzalez, and after the Public Defender's Office certified a conflict, attorneys Ron Gainor and William Castro were appointed to represent Ana Cardona. Castro's involvement in the case ceased on August 27, 1991, and Andrew Kassier was later appointed to assist Mr. Gainor in representing Ms. Cardona.

On February 14, 1992, Gonzalez-Mendoza changed her previously-entered not guilty pleas to guilty for a reduced charge of Second Degree Murder as to Count I of the indictment, pursuant to a previously-arranged plea deal with the State of Florida.[1]

Ms. Cardona's trial commenced March 5, 1992, and on March 20, she was found guilty of first-degree murder and aggravated child abuse (R. 3417). A penalty phase commenced on March 25 (R. 3495). The jury recommended death by a vote of 8-4 (R. 3785). The court imposed death and 15 years (R. 3800). HAC was the sole aggravator found (R. 3802). The court found the existence of mitigating circumstances, but afforded them little weight due to the lack of evidence and the fact that the court did not believe that Ms. Cardona suffered from any major mental illness (R. 3807-11). On direct appeal, this Court affirmed. Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, 115 S. Ct. 1122 (1995).

Ms. Cardona filed her original motion for postconviction relief on March 20, 1997. Following a series of orders tolling time under Rules 3.851 and 3.852, as well as public records litigation, a final motion was filed in July, 1999. After a hearing pursuant to Huff v.

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[1]On April 6, 1992, the trial court sentenced Gonzalez to 40 years on Second Degree murder conviction, and a concurrent 15 years for aggravated child abuse (R. 3824). In 1995, Gonzalez filed a Rule 3.850 motion alleging that counsel coerced her to change her plea and therefore her plea was invalid. The summary denial of her motion was affirmed by the Third District. Gonzalez-Mendoza v. State, 678 So. 2d 345 (Fla. 3d DCA 1996).

State, 622 So.2d 982 (Fla. 1993), the court orally granted an evidentiary hearing on some claims and orally denied others. The evidentiary hearing was conducted on May 16-18, 2000, with closing arguments on May 19. 5 days later, the court entered its order of denial. This appeal follows.

SUMMARY OF ARGUMENTS

1. No adversarial testing occurred at the guilt phase for numerous reasons, and the lower court's order failed to address many issues and failed to apply proper legal standards. The State admittedly withheld 3 interviews it had conducted with the codefendant Gonzalez. These interviews, as the lower court found, would have provided the defense with abundant additional impeachment of Gonzalez. Moreover, the State failed to correct Gonzalez's false testimony at trial that prior to entering into her plea she never discussed her case with the State. Defense counsel also rendered prejudicially deficient performance in failing to adequately cross-examine Dr. Merry Haber about her opinion that Gonzalez suffered from a dependent personality and battered spouse syndrome, failed to present evidence of Gonzalez's confessions, failed to rebut the battered spouse syndrome, failed to present evidence that another person had confessed, failed to seek a change of venue, and failed to object to prosecutorial closing argument. These errors must be considered cumulatively, and Ms. Cardona is entitled to a new trial.

2. All of the information relating to the inadequacy of the guilt phase applies equally to the penalty phase, in particular the issues relating to the credibility of codefendant Gonzalez. In addition, defense counsel's presentation of inconsistent mental health theories at the penalty phase was prejudicially deficient. The defense put on two experts who completely contradicted each other, yet had another expert who would not have provided inconsistent theories had he been called in lieu of the ones that were. In light of only one aggravator, the jury's close 8-4 vote, the mitigation presented below, Ms. Cardona was prejudiced. The lower court's order fails to address many of the issues on which a hearing was granted, fails to apply proper legal standards, and findings are not supported by competent and substantial evidence.

3. Numerous public records were withheld. The lower court erred in finding many of the records irrelevant. The lower court also sealed a number of documents for *in camera* review, including notes from the State Attorney. Any notes regarding witness preparation or interviews, particularly relating to the codefendant, should be disclosed to Ms. Cardona.

4. The lower court erred in summarily denying Ms. Cardona's claim that she was incompetent and that counsel failed to seek a competency hearing. Indicia of incompetency were known to counsel. An evidentiary hearing is warranted.

5. Ms. Cardona's insanity precludes her execution under the Eighth Amendment.

6. Ms. Cardona is innocent of the death penalty and must be sentenced to life imprisonment without the possibility of parole for 25 years.

ARGUMENT I--NO ADVERSARIAL TESTING AT THE GUILT PHASE.

A. INTRODUCTION. Numerous errors infected the guilt phase. Singularly and cumulatively, these errors require a new trial. This Court reviews the errors herein *de novo*, and defers to any finding of fact that is supported by competent substantial evidence. Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

B. BRADY/GIGLIO VIOLATIONS REGARDING OLIVIA GONZALEZ. The State violated its duty under Brady v. Maryland, 373 U.S. 83 (1963), in failing to disclose to Ms. Cardona reports of 3 separate interviews between codefendant Gonzalez and investigators from the State Attorney. The reports, disclosed in the collateral discovery process, were introduced below as exhibits D, E, and K. The State also withheld a letter from Gonzalez's attorney to prosecutors dated September 10, 1991, setting forth Gonzalez's proffered testimony, introduced below as Exhibit A. Following the evidentiary hearing, the State conceded it violated its duty to disclose:

> The State does not dispute the fact that there is a violation of our failure to turn over these reports, [we] explained that it wasn't done on purpose but that does not affect the fact that there was the failure for the State to do so.

(PCR. 1530-31).[2]

Ms. Cardona also asserts that the State presented and failed to

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[2]The State did dispute that it had a duty to disclose the proffer letter.

correct false testimony through Gonzalez regarding her dealings with the State. At trial, Gonzalez testified that prior to entering into her deal, she had not spoken anyone about her case, much less the prosecution (R. 2932; 2944). As is now known, that testimony was flatly false and went uncorrected by the State, in violation of Giglio v. United States, 405 U.S. 150 (1972).

The lower court found as a matter of fact that "it is abundantly clear to this Court that those reports would have assisted defense counsel in impeaching Olivia Gonzalez Mendoza" but that Ms. Cardona failed to demonstrate materiality (Supp. PCR. 935). The lower court failed to address the Giglio claim.[3] As demonstrated below, the testimony and exhibits from the evidentiary hearing establish Ms. Cardona's entitlement to relief, and further that the lower court applied an erroneous legal standard in assessing the materiality prong.

1. THE EVIDENCE BELOW.

a. Jamie Campbell. Campbell was assigned to the Cardona prosecution, along with Catherine Vogel (PCR. 898). She and Vogel split up the work 50/50, although Vogel was "the lead attorney" and in charge of discovery (Id. at 899). She and Vogel worked on the plea

[3]In fact, the lower court failed to address many of Ms. Cardona's claims. Should the Court determine that Ms. Cardona is not entitled to relief on the claims that the court addressed, she is entitled to a remand so that full consideration of remaining claims can be conducted.

negotiations with Gonzalez (Id. at 900).

Campbell identified a letter dated September 10, 1991 (Exhibit A), as a letter from Gonzalez's attorney, Bruce Fleisher, who had "approached us to see if he could resolve Ms. Gonzalez's case" (Id. at 903; Exhibit A). The letter was the result of conversations between the prosecutors and Fleisher (Id. at 903-04). To Campbell's knowledge, the issue of a possible negotiation with Gonzalez had not been on the table when Campbell became involved in the case (Id. at 904-05). Prior to the letter, Campbell personally had no involvement in seeking to have Gonzalez interviewed by the office (Id. at 906). Following Fleisher's letter, Campbell and Vogel were "trying to work out the details" and eventually there was "a polygraph" given to Gonzalez; Campbell "had written questions of areas we were concerned" about and provided them to Fleisher (Id. at 907-08; Defense Exhibit B).

Following Fleisher's September 10 letter, Campbell wrote him back, indicating that Gonzalez "will be interviewed by Maria Zerquera and Ray Mier, in your presence, at the State Attorney's Office in Investigations on Thursday, September 9, 1991 at 10:30 AM" (Exhibit C, PCR. 911).[4] She then executed an interoffice memo requesting that Gonzalez be brought to her office on September 19 (PCR. 912; Exhibit D).

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[4]Campbell explained that the reference to September 9 must have been a typographical error, since that date preceded the letter itself (PCR. 911).

Campbell explained that Maria Zerquera, an investigator from the State Attorney's Office, had been on the case from the beginning, and she (Campbell) "probably" would have talked with her prior to the Gonzalez interview or "at least given her the proffer letter" (PCR. 914). Campbell did not attend the Gonzalez interview because "[i]nterviewing witnesses is not one of [my jobs]" and it would not have been "appropriate" for her or Vogel to be present (Id.). Campbell was shown the reports from Gonzalez's three interviews with the State Attorney's Office investigators, but testified that she had "never seen them before" (Id. at 917). Nor could she identify as hers the handwriting on them (Id. at 920).

Following the interviews with Gonzalez by her investigators, Campbell spoke with the investigators (Id. at 918), and acknowledged that Gonzalez's statements were subject to disclosure following her plea (PCR. 921).

Campbell also acknowledged that between the date of Gonzalez's plea on February 14, 1992, and the day she testified at trial, Gonzalez "was brought over to the State Attorney's Office prior to her testimony" in order to "you know, to go over what her testimony would be" (PCR. 921).

b. Catherine Vogel. Vogel was assigned to prosecute Ms. Cardona's case at the very beginning (PCR. 941). She did not recall when she began to entertain the idea of negotiating a deal with Gonzalez but

that it was "later on" in the chronology of the case (Id. at 942). Vogel did not recall "pursuing her" but rather it was her attorney who "pursued us" (Id. at 943).

As to Gonzalez's interviews with the State, Vogel knew that she was interviewed but did not recall making the arrangements (Id. at 944). Maria Zerquera and Ramon Mier, the investigators, would not have talked with Gonzalez without knowledge of and approval by the legal team (Id. at 947). After the investigators' interviews, Vogel would have had a conversation with them but had no "specific recollection of what was said" and took no notes (Id. at 948). After being shown the reports of the 3 interviews, Vogel testified that she did not know about them at the time they were written (Id. at 949).[5] Vogel conceded

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[5]However, Vogel was shown handwriting on a post-it note that was on one of the reports and acknowledged that "it might be my handwriting, but, there again, there are things about it that are not my handwriting. I can't tell you if this is my handwriting or not" (Id. at 951). She then provided a tortured explanation as to this handwriting:

> A Now, some of -- some of this looks -- this might be mine, but some of it is not. I don't know how to say it.
>
> No. This is -- I want to say, but by looking at this, it might be my handwriting, but, there again, there are things about it that are not my handwriting. I can't tell you if this is my handwriting or not.
>
> I never made a "T" like this, so this does not look -- some of this looks like mine, some of it does not. I don't know what to tell you. I cannot tell you other than -- I don't think this is mine, "In prison in Cuban mental hospital. In U.S., check."

that "If I had known that these had existed, I would have made copies. I would have turned them over in Discovery, to Ana Cardona's discovery" (Id. at 950).

Vogel also corroborated Campbell's recollection that prior to her testimony, Gonzalez was brought to Vogel's office for a "couple hours" in order to "go over what her testimony would be and also to inform her about what testifying is like" (PCR. 952). This session lasted "[a] couple hours" (Id.).

> Q Can you say under oath either way?
>
> A No. I could tell you that this "mental" looks like my handwriting, but the word "Cuba" does not.
>
> I could tell you that the word "hospital" looks like mine, but the word "be" does not.
>
> And the word "check" does not look like mine. So this is somebody who's handwriting is similar to mine. I can't tell you one way or the other.
>
> I'm inclined to tell you that this is not my handwriting.

(PCR. 951). In redirect, Vogel explained that maybe someone purloined her post-it note and stuck it on the report:

> Okay, I'm going to tell you something. I never saw that report. I have never seen that report ever. If that is my handwriting, I don't know if it is or not. I told you that. If somebody took one of my sticky notes, I don't know what they did as far as putting it on there if I wrote it out, although I did not put it on this report because I have never seen that report before.

(Id. at 972).

On cross, Vogel testified that there was nothing different between "the substance" of the statements that Gonzalez made during her polygraphs and what investigator Zerquera told her was said during the 3 interviews with Gonzalez (PCR. 962).[6] Once Gonzalez had become a witness for the State, Vogel listed Gonzalez in its discovery, as well as George and Brian Slattery (who conducted Gonzalez's polygraphs), and Dr. Merry Haber, who was Gonzalez's therapist (Id. at 962-63).[7]

On redirect, Vogel explained that she did not recall specifically what Zerquera had said about the Gonzalez interviews but that "we polygraphed her on what she had told Maria Zerquera. So that whatever she would go to the polygraph, the questions that she was asked and the statements that she would give would be consistent with what she had given Maria Zerquera" (Id. at 965). However, Vogel was not sure if Zerquera had attended Gonzalez's polygraphs (Id.).[8] She also could not recall if Zerquera reported to her after each of Gonzalez's interviews or whether she debriefed Vogel after they were all completed (Id.). Zerquera did not go into "great detail" about what Gonzalez had said during these interviews (Id. at 968). According to Vogel, "the big issue was who hit Lazaro in the head with a baseball bat" (Id.).

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[6]On direct, Vogel professed a lack of recollection about what Zerquera had told her about the interviews (PCR. 948).

[7]Neither Maria Zerquera nor Ramon Mier, however, were listed in the State's discovery.

[8]There is no indication that she did.

Vogel also acknowledged that she was the one who conducted Gonzalez's examination at Ms. Cardona's trial and was present when Gonzalez testified as follows:

> Q [by Mr. Kassier] Now Miss Gonzalez, you recall that the day you pled guilty to murder and pled guilty to aggravated child abuse was Friday, the 14th, Valentine's Day, correct:
>
> A Yes.
>
> Q **And at that time you had not had discussions with the prosecutors about your case; had you?**
>
> A **No.**

(R. 2944) (emphasis added). In light of Gonzalez's numerous conversations with state investigators and the "hours" spent with Vogel going over her testimony, Vogel was asked about whether Gonzalez's testimony was truthful:

> Q Now, if Ms. Gonzalez had testified that they had never had any conversations with the State Attorney's Office prior to the time of her plea, would that have been truthful testimony?
>
> A I don't know. You would have to ask her.
>
> Q Okay. Well, based on what you told us here today, was that truthful testimony? That is a truthful answer?
>
> A Let me --
>
> Q Please. No, please answer my question. Yes or no, was it a truthful answer?
>
> A I don't know.
>
> Q You don't know?

A Again, let me explain to you why.

Q You don't know the answer. Is that your answer, you do not know?

A Sir, I am now going to explain my answer. You are asking me if it is truthful or not. I don't know what her understanding was of conversations with the State Attorney's Office.

First of all, it is clear to me that if she assumed that, we're talking about myself and Ms. Campbell. She had conversations with Maria Zerquera. Whether or not she understood that Maria Zerquera was from the State Attorney's Office, I don't know. So I really can't crawl inside Olivia Gonzalez's head in order to tell you whether or not her testimony is truthful.

Q Okay.

A So I'm not going to venture a guess on whether or not she is telling the truth.

Q You would also have indicated that you had pretried her --

A That's correct.

Q So if she said at her trial at cross that she never spoke to the prosecutors about her case, would that have been truthful?

A I don't know. You would have to talk to her about what her understanding of the question is. I mean, whether or not -- what do you mean by her case?

I don't -- I don't -- I can't crawl inside Olivia Gonzalez's head and tell you whether or not she made a purposeful misstatement of fact. So I'm not going to tell you whether or not I think that that answer is truthful or not.

(PCR. 973-75). Vogel was aware that the law imposes on her a duty to inform the court about and correct false testimony (Id.).

c. Maria Zerquera. Zerquera is and was an investigator for the State Attorney's Office (PCR. 977). One of her duties is interviewing witnesses, and as a normal practice she would take notes of interviews (PCR. 983). She would do a report if an interview was extensive and she needed to recall what transpired (Id. at 984).

Zerquera interviewed Gonzalez 3 times; she did not remember who told her to conduct the interviews (Id. at 985). The dates of her three reports were September 19, 1991, October 1, 1991, and October 3, 1991, and were introduced into evidence as exhibits K, L, and M (Id. at 986; 989). After the first interview, she briefed Vogel and Campbell because they "need to know what was going on" (Id. at 996). Her debriefings did not include a line-by-line recitation of her notes (Id. at 997). The reports were accurate memorializations of what occurred during the interviews with Gonzalez (Id. at 1001-02).

d. Ramon Mier. Mier worked with Maria Zerquera on Ms. Cardona's case and participated in the Gonzalez interviews (Id. at 1017). Zerquera asked the most questions during the interviews was probably taking the notes (Id. at 1018). He was "sure" that he and/or Zerquera met with the prosecutors both before and after the interviews (Id. at 1019-20). The reports were written by Zerquera (Id.).

e. Gary Schiaffo. Currently employed as a State Attorney investigator, Schiaffo was previously a detective with the Miami Beach Police Department and headed the investigation of Ms. Cardona's case

(Id. at 1023-24). He identified a police report he authored dated November 3, 1990, regarding the results of the autopsy of Lazaro Figueroa (Id. at 1027-29) (Exhibit Q). This report provided in pertinent part:

> In addition to these investigations, Sgt. Matthews and Det. Scrimshaw attended the autopsy to the victim (see Det. Scrimshaw's supplement). Dr. Hyma advised that the cause of death was from trauma to the head further being a massive ceribal [sic] Hematoma to the front left lobe extending to the top of the skull. In addition the victim has his right arm broken.

(Exhibit Q).[9]

Early in the investigation he did not discuss with the prosecutors a possible negotiation with Gonzalez (PCR. 1029), but he identified a report dated December 29, 1990, introduced below as exhibit R, indicating that he did discuss with Vogel a possible deal if there was no additional evidence (Id. at 1032-34). He then agreed that this discussion took place "earlier on in the investigation" (Id. at 1033).

f. Ron Gainor. Gainor, along with Andrew Kassier, represented Ms. Cardona at trial. Gonzalez's role in the case was more important than the lay witnesses presented by the State because she was in Ms. Cardona's life "the entire time" of the documented abuse (PCR. 1055, 1060). Prior to Gonzalez entering Ms. Cardona's life, there had been

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[9]This report was provided to Ms. Cardona's collateral counsel by the Miami Beach Police Department during the Chapter 119 process.

no abuse reported; the abuse "coincide[d]" with the arrival of Gonzalez (Id.).[10]

Gainor "would definitely expect" to have been provided with statements of Gonzalez once she entered her plea (id. at 1056), and the defense "would have been entitled to" any information that Gonzalez had conversations with the State Attorney's Office because "that information is necessary to put together a competent cross-examination" (Id. at 1056-57). He had not been provided with the 3 Gonzalez interviews (Id. at 1058). He did not recall having seen the proffer letter (Id. at 1059). Gainor explained why this information would have been important to the defense case:

> Well, to the extent that it might have uncovered a dialogue between she, her lawyer and the State, yes. Because it would potentially show promises that were made or conversations that were had or statements that were made and in anticipation of cooperation that may be inconsistent with her trial or deposition testimony.
>
> There are a lot of variables involved, but knowing it, yes, I would have liked to have known that. I would liked to have known who she sat down with, who she spoke with, what she said. If she was honest in certain areas and dishonest in others, it may have been material in cross-examination.

(Id. at 1062).

g. Andrew Kassier. Kassier was brought into the case during the discovery process and was assigned to primarily handle the penalty

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[10]In fact, the prosecution conceded at the time of trial that "we have no evidence of physical abuse prior to November 30 [1988]" (R. 2436). Gonzalez met Ms. Cardona in March of 1989.

phase (Id. at 1107-07). However, as the trial approached and it became known that Gonzalez had flipped, Gainor and Kassier decided that Kassier would handle the cross-examinations of the medical examiner, Dr. Hyma, as well as Gonzalez herself and Dr. Merry Haber (Id. at 1113).

Once Gonzalez flipped and her deposition had been taken, Kassier explained that the "best strategy in the case in terms of the physical evidence ... was going to be to indicate to the jury that Ms. Gonzalez was, in fact, the person who had caused the death of the child" (Id. at 1108). After flipping, Gonzalez because a "[v]ery significant" witness for the State (Id. at 1114).

Kassier explained his strategy for his cross-examination of Gonzalez:

> [M]y first objective was to make sure that the jury understood that she had ultimately admitted and, in fact, testified at deposition that she had administered one or two blows that, according to the Medical Examiner, was, in fact, fatal blows. I felt that was the most critical piece of evidence I had to get from her.
>
> I wanted also to establish to the jury she had lied in the past when it was convenient for her. She was every bit as much facing the possibility of the death penalty at the time that she took her plea with the State.
>
> And I was basically trying to challenge her credibility as to any point where she tried to absolve herself of guilt or shift the blame for the child's death on to Ms. Cardona.

(Id. at 1115).

Kassier also would have wanted and expected to receive any prior

statements of Gonzalez and had no recollection of having the reports of the 3 interviews (Id. at 1115-17). If he had had her statements, he would have had no reason not to cross-examine her on any inconsistencies between her testimony and either the interviews or her proffered testimony (Id. at 1119-22).

h. Bruce Fleisher. Fleisher represented Gonzalez (Id. at 1225). He identified exhibit A as the letter he wrote to Vogel "giving her a proffer of what my client would testify to in a plea with cooperation" (Id. at 1226). The information identified as the testimony of Gonzalez "could only have come from my client" (Id.). On cross examination, he reiterated that "we had an interview with her and that is what she told us" (Id. at 1228).

2. MS. CARDONA ESTABLISHED A BRADY VIOLATION AS TO GONZALEZ. In order to prove a violation of Brady, Ms. Cardona must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment," and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433-34; Young v. State, 739 So. 2d 553 (Fla. 1999); Rogers v. State, 2001 WL 123869 (Fla. 2001). To the

extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and impeaching Gonzalez with it. The issue of materiality is subject to *de novo* review, although the Court gives deference to findings of fact supported by competent and substantial evidence.

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Id. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495 (2000); Kyles, 514 U.S. at 434.

With respect to the 3 Gonzalez interviews, there is no dispute as to their suppression; the State conceded this below (PCR. 1530-31). The State did dispute its obligation to disclose the proffer letter because it "was made in contemplation of plea negotiations" (Id. at 1531). However, the lower court presumed that the State had violated its duty to disclose and found only that the proffer letter, along with the other documents, was not "material" (PCR. 935).

The State's justification to the lower court as to the proffer letter contradicts its position with respect to Gonzalez's interviews. The prosecutors below justified their non-attendance at Gonzalez's interviews because "she was still a defendant" and the interviews were "in furtherance of her proffer and her plea" (PCR. 970). Yet the State

acknowledged it violated its duty to disclose these interviews (Id. at 950 1530-31). There is no logical distinction between the interviews and the proffer letter; both were conducted "in furtherance" of her plea.

The State also argued below that it had no duty to disclose the proffer letter because Gonzalez may not have "authorized" the statements and they were not "admissible" (PCR. 1531). This argument apparently was rejected by the lower court because it is meritless. The State's Brady obligation does not apply only when a statement is "authorized" by the declarant (whatever that means), or when a statement is "admissible" at trial. Rogers v. State, 2001 WL 123869 at n.11. To the extent that there remains a question about the State's duty to disclose the proffer letter, courts have held that such be disclosed. Cruz v. State, 437 So. 2d 692 (Fla. 1st DCA 1983), disapproved on other grounds, Edwards v. State, 548 So. 2d 656 (Fla. 1989); Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 557 (4th Cir. 1999).

In rejecting the Brady claim, the lower court made the following findings and conclusions:

> 9. As to defense counsel's contention that Brady material was withheld by not providing counsel with the investigators' reports from the State Attorney's Office, **it is abundantly clear to this Court that those reports would have assisted defense counsel in impeaching Olivia Gonzalez Mendoza,** but that she was sufficiently impeached to a point where they needed not even call the polygraph examiners to

> impeach her testimony. Thus, the testimony of the prior co-defendant was not necessary to obtain the defendant's conviction. Thus there was no prejudice to the defendant by failing to produce the 2 reports, or the proffer letter from Gonzalez Mendoza's attorney.
>
> 10. There was no reasonable probability that any omitted evidence would have changed the conclusion of this jury.

(PCR. 935) (emphasis added). As noted above, the finding that the withheld information "would have assisted defense counsel in impeaching Olivia Gonzalez Mendoza" is a finding of fact due deference. The lower court's materiality analysis, however, is flawed.[11]

The conclusion that Gonzalez was "sufficiently impeached" is flatly contradictory to the finding that the withheld documents "would have assisted defense counsel in impeaching" Gonzalez (PCR. 935). If there was information that would have assisted counsel in further impeaching Gonzalez, then logically she was not "sufficiently

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[11]During the hearing, the lower court demonstrated a lack of understanding that Brady encompassed impeachment evidence, and would not accept the representations of Ms. Cardona's counsel on the state of the law until the prosecutor agreed with him (PCR. 936-37). The same prosecutor, at another point in the hearing where the trial court expressed confusion about his role in evaluating a postconviction claim, made the following remarks about this Court's capacity to "understand" how to evaluate these cases:

> MS. BRILL: To be frank, I understand you understand. I'm not sure what the Supreme Court understands and sometimes things need to be spelled out to them. And I would be quite frank with that; in a capital case, things need to be spelled out.

(PCR. 1180).

impeached." That the polygraph experts were not called has nothing to do with a Brady materiality analysis, and further overlooked Ms. Cardona's separate claim that counsel inadequately cross-examined Gonzalez and Dr. Merry Haber, and failed to call the polygraph examiners at either the guilt or penalty phases. As the Supreme Court has observed, "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others." Kyles, 514 U.S. at 445. Even the prosecutor below acknowledged that had counsel had Gonzalez's statements, "that probably would have been appropriate impeachment" (PCR. 1532).

That Gonzalez's testimony "was not necessary to obtain defendant's conviction" is also not a proper materiality analysis. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-35. Rather, the suppressed information must be evaluated in light of the effect on the State's case as a whole and the "importance and specificity" of the witness' testimony. United States v. Scheer, 168 F.3d 445, 452-53 (11th Cir. 1999). As the Eleventh Circuit recently noted:

> In short, [the witness about whom impeachment evidence was withheld] was a crucial prosecution witness. Again, we do not imply that he was the only witness who testified against Scheer, nor do we suggest that there was not other compelling testimony that would support Scheer's conviction. **Rather, it is because of the relative importance of Jacoby's testimony that we view his credibility to the jurors as so fundamental to Sheer's convictions.**

Id. at 456 (emphasis added). Thus, that the State did not "need" Gonzalez's testimony to "convict" Ms. Cardona is irrelevant to the materiality analysis.

Moreover, the court's downplaying of Gonzalez's role in the State's case is belied by the prosecutor's own representations to the jury. At the guilt phase, the prosecutor argued that Ms. Cardona "participated in a greater amount of the abuse than Olivia Gonzalez did. **That's the reason why, if the State needed witnesses and we have to choose between a rock and a hard place, that's why Olivia Gonzalez was brought before you as a witness. Olivia Gonzalez came in here and told you what happened**" (R. 3387-88) (emphasis added). See also R. 3362 ("Olivia Gonzalez answered a lot of questions for us").[12] Below, the prosecutor reiterated that Gonzalez's testimony "did let the jury

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[12]The importance of Gonzalez to the State's case was made even clear during the prosecutor's closing argument at the penalty phase:

> Where would you -- where would we be without her? Where would we?
>
> What would be know about this case had Olivia Gonzalez not testified?
>
> There would have been a very large hole in the case that three months where this defendant, where this defendant binds and gags her child and puts him in this closet.
>
> If Olivia Gonzalez was not here to tell you where Lazaro Figueroa was there would be no way to show that this defendant bound and gagged her own child and left him in this closet.

(R. 3761-62).

know some of the specifics that had occurred in between those 18 months" and that she "completed the story" (PCR. 1537). As the Supreme Court has observed, "[t]he likely damage [to the State's case due to suppressed information] is best understood by taking the word of the prosecutor." Kyles, 514 U.S. at 444.

In light of Gonzalez's significance to the case, the materiality of the undisclosed evidence, alone and in conjunction with the other errors affecting the guilt phase described in this brief, becomes evident. One of the most glaring areas of inconsistency between Gonzalez's trial testimony and the undisclosed statements involved her description of November 1, 1990, the day that Lazaro died. At trial, Gonzalez provided the following description of that day:

> A I came home from work. I opened up the door to the closet to see the boy, and he started screaming because his mother was coming behind me, he was frightened of her.
>
> Q Was his mouth taped?
>
> A No, at that moment it was not.
>
> I confronted him with the bat. I told him I was going to hit him if he did not shut up, but the mother, the defendant, grabbed it from my hand and stayed with it.
>
> When I thought, that she was going to put tape over his mouth and put him in the closet again. I went to bathe. When I came out of the bathroom, she told me, "I believe I killed him."
>
> I went running, looking for him. He was lying down in the closet, looking up, with a piece of paper in his mouth.
>
> I tried to revive him. I grabbed alcohol, water,. I poured water and alcohol over his head. I tried to pick him

up, but no, it didn't do anything. He stayed immobile.

That's when she took him, got him dressed, put tape around the Pampers, wrapped him in a bedspread, told me that we had to dump him.

I told her about taking him to the hospital or something. She told me whether I was crazy or was I a snitch.

She went out first to see whether there was anyone out there. I was terrified and frightened. I had never think such a thing. I got frightened by her, by the attitude she had.

And I climbed in the car with her, I drove off, drove and drove. I don't know. I did not know of any fixed place to go to. I went toward the beach. I drove by Alton Road, and by one of those houses on Alton Road. She told me to stop. She took the child out of the bedspread. It fell to the ground. She picked him up with her hands and she left with him.

I stayed with the hand over the steering wheel like this. I don't know. I don't know where she placed him. That was all.

(R. 2902).

Gonzalez's version contained in the proffer letter in the possession of the State, however, provided a vastly different version on many crucial points:

On the evening of November 1, when Olivia arrived home after work she walked into their apartment to find Ana Cardona in a crazed state of hysteria and perhaps under the influence of drugs. Lazaro was wrapped up in a blanket, possibly in a closet and Olivia thought he was dead. The child was still, rigid, and an ashen bluish color. The child was not breathing, and she could not detect a heartbeat. Olivia and Ana tried to revive the child with alcohol, and perfume to no avail. Ana did not know if the child was dead and said that they should take him to a wealthy neighborhood where someone could perhaps revive him and take care of him.

> These women had no money. Olivia drove the car with Ana holding the body wrapped in a blanket. When they got to the Donnelly residence Olivia pulled the car over in the street and Ana took the baby out of the car. Olivia did not know where Ana placed the baby, nor could she see from where she was in the car. At this point Ana told Olivia that they would have to leave town, they went back to their apartment, picked up the other two kids, pack a few things, an moved to St. Cloud.

This version differs from the trial version in significant ways. NO mention of Ms. Cardona grabbing a bat from Ms. Gonzalez. NO mentior of Ms. Cardona telling Ms. Gonzalez "I think I killed him." At trial, Gonzalez portrayed herself as the one who attempted to revive the child, whereas in the letter she indicated that *Ms. Cardona* tried to revive him. At trial, Gonzalez portrayed herself as the one so concerned about the boy that she was the one who suggested taking him to a hospital and that Ms. Cardona called her "crazy and a "snitch" anc told Gonzalez that they had "to dump him," whereas in the proffer it is *Ms. Cardona* who "said that they should take him to a wealthy neighborhood where someone could perhaps revive him and take care of him."[13] At trial, Gonzalez testified that Ms. Cardona wrapped the boy

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[13]On this point, the State during closing argument took advantage of its failure to disclose and belittled the defense's attempt to argue that it was Ms. Cardona, not Gonzalez, who tried to get help for Lazaro:

> Defense counsel says to you Miss Cardona wanted him to be found, that she took him to the home of rich people who were going to take care of him and left him in the circular driveway. Well, I forgot to mention, hidden in the circular driveway. **This is not what the evidence is, this is what they want you to believe the evidence showed. This is what**

up in a bedspread after Gonzalez attempted to "revive" him, yet in the letter she indicated that the boy was "possibly" in the closet in the bedspread when she arrived at home. At trial, Gonzalez detailed that after they arrived at on Alton Road, Ms. Cardona dropped the boy and he "fell to the ground. She picked him up with her hands and she left with him." There is NO mention of this graphic moment in her proffer. And throughout her trial testimony, Gonzalez repeated that Ms. Cardona was never abusive or neglectful when she was using crack and/or powder cocaine (R. 2799; 2817; 2844; 2855; 2860; 2863; 2870), whereas in her proffer, Gonzalez stated that she arrived home that day "to find Ana Cardona in a crazed state of hysteria and perhaps under the influence of drugs."[14] These little "extras" to her testimony no doubt inflamed

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> **Mr. Gainor would have hoped the evidence showed. It's not what the evidence is in this case**.

(R. 3364) (emphasis added). Due process is violated where the State withholds evidence and then turns around and presents false or misleading argument on the subject matter of the withheld evidence. Davis v. Zant, 36 F.3d 1538, 1551 (11th Cir. 1994). See also United States v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977) (new trial ordered because "The Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider").

[14]During her undisclosed interview of September 30, 1991, Gonzalez also admitted that she and Ms. Cardona were doing "a lot of drugs and that when Lazaro started to `act up,' Ms. Cardona would start screaming and saying that 'Lazaro is the reason we have so many problems in our lives!' **According to Ms. Gonzalez, that statement coupled with the fact that she was doing a lot of drugs, would make her crazy, and she would take it out on Lazaro**." This is totally contrary to the State's attempts to establish through Gonzalez that any instances of abuse involving Ms. Cardona were not related to drug usage.

the passions of the jury to view Ms. Cardona in an even worse light.

Gonzalez's version of November 30 that she provided at trial also differed from the version she told the State Attorney's Office in the undisclosed interviews. During her September 19, 1991, interview, Gonzalez reported that she arrived home from work to find Ms. Cardona "screaming `He fell off the bed!'" Gonzalez then went to the closet "and noticed that Lazaro was lying flat in the closet floor, motionless"; he was not gagged but was wearing pampers and the floor of the closet and Lazaro "were very wet, as if a bucket of water had been thrown inside the closet." When she approached him, Gonzalez noticed that he had been beaten and had bruises all over his body. Gonzalez then reported that "she started crying and screaming and Ms. Cardona `What happened to him, what happened to him!'" Then Ms. Cardona said "I killed him, we have to throw him away." After that, Gonzalez reports that Ms. Cardona put pampers on the boy and got him dressed, and wrapped him in a blanket. According to Gonzalez, after wrapping him a blanket, Ms. Cardona "called Juanito and Taimi who were still outside playing" and told them that the boy "had fallen off the bed and had hurt himself" and they "were going to take him to the hospital."

As can be seen, the stories Gonzalez told both to her attorney and to State investigators about November 30 was drastically different, and due to page limitations, this brief can only point out some of the more salient contradictions. But in addition to the events of November

30, the undisclosed interviews provided highly contradictory information about other matters.

As noted above Gonzalez provided graphic detail to the jury about types of abuse she observed Ms. Cardona inflict on Lazaro at each and every hotel and residence they lived in. However, in her interview of September 19, 1991, Gonzalez reported that Lazaro "was emotionally and physically abused **on a daily basis by both Ana Cardona and herself. Since the abuse occurred so often, she stated she could not be specific on times dates and locations."** In her second interview with the State investigators on September 30, 1991, which was specifically done "in an attempt to establish Ms. Gonzalez's direct involvement in the physical abuse of Lazaro Figueroa," Gonzalez again told investigators that the first time she herself hit Lazaro was while they were living in the hotels but she "does not remember what hotel they were living in, nor a specific incident when she hit Lazaro, or why she hit him." Her lack of recollection is in marked contrast to her graphic blow-by-blow descriptions for the jury of specific instances of abuse at every address they ever lived.[15] Her admission that she **and** Ms. Cardona

[15]See R. 2790-92 (specific abuse incurred while at Hialeah house); 2796-2801 (specific abuse while at trailer belonging to Lorenzo Pons and Reynaldo Rodriguez); 2804-08 (specific abuse incurred at Olympia Hotel); 2819-21 (specific abuse incurred at Ocean Palm Hotel); 2826-40 (specific abuse incurred at the Tahiti Hotel); 2847-52 (specific abuse incurred at the Saturn Hotel); 2855-60 (specific abuse incurred at the home of Lorenzo Dominguez); 2861-63 (specific abuse incurred at Ronnie's Hotel); 2865-70 (specific abuse incurred at home of Lorenzo Dominguez).

abused the boy "on a daily basis" is also contrary to her protestations at trial that she did not abuse the boy as much as Ms. Cardona.

More inconsistencies abound. In September, 1990, Ms. Cardona and Olivia Gonzalez moved into an apartment rented from the Piloto family. In her September 19 interview, Gonzalez told investigators that

> during the last two months of Lazaro Figueroa's life (September and October 1990) she hardly saw him, not only because she was working long hours, but because she tried to avoid seeing him because of the condition he was in. According to Gonzalez, `He was always in the closet tied, bound and battered.'

At trial one would be hard pressed to believe that Gonzalez "hardly saw" Lazaro while they lived at the Piloto's apartment. She was able to tell the jury in detail about each alleged abusive incident beginning with the time when they had just moved into the Piloto's apartment and Ms. Cardona "hit him with the bat on the arm, on the head" (R. 2885). She did this because she "didn't want to see him....She wanted to kill him" (Id.). The next incident she recalled was when Ms. Cardona hit Lazaro in his arm with a bat at around 5 or 6 PM that day (R. 2886). She then recounted that "[d]ays before that . . . [Ms. Cardona] took the bat and beat him over the head . . . and she opened a hole like this in his head" (R. 2888).

During the "first month" they were at the Pilotos, Ms. Cardona would, according to Gonzalez, "stick her fingers in his eyes, she'd bite his nails" (Id.). She added that Ms. Cardona "liked to bite his nails" and would "laugh (Id. at 2888-89). She also told the jury that

Ms. Cardona, at the Pilotos' home, would take the bat and mash the boy's toenail "and that nail fell off" (R. 2889). This incident occurred on a Sunday around 5 in the afternoon (Id.). During that first month, Ms. Cardona also would put Lazaro in the bathtub with the hot or cold water running and leave him alone (Id. at 2889-90). Also during the first month Ms. Cardona would "drag" Lazaro by the hair to the bathroom (id. at 2890-91); strike him with her hand (id. at 2891); and hit him with a belt (id.).

Gonzalez's memory about "the second month" at the Piloto home was also markedly improved from her pretrial lack of recollection, particularly for someone who "hardly saw" Lazaro. Specifically in the "second month," the prosecutor elicited that Ms. Cardona broke a dish over the boy's head when he would not swallow his food (id. at 2895), struck him with a belt (id. at 2896), taped his mouth shut (id. at 2897), and administered Benadryl to "knock him out" (id.). It was also while at the Piloto house that Ms. Cardona told her that she wanted "to dump" Lazaro by Halloween because "many children got lost. He would be one of the many lost children" (Id. at 2878). Gonzalez "argued" with Ms. Cardona about this but Ms. Cardona wanted to make Lazaro "disappear" (Id.).

Gonzalez also described a specific incident on the "last day of October" when Ms. Cardona "got pissed off and she hit him with a bat over the head" because Lazaro was slow in taking off his Pampers (Id.

at 2897-99). After demonstrating for the jury's benefit the motion used by Ms. Cardona in swinging the bat, Gonzalez described in specific detail that "[a] hole was opened up in his head. His head was cracked" (Id. at 2899). The wound "started bleeding and bleeding and bleeding, and then I put mercury on it and I applied a plastic band" (Id. at 2900). She also testified that Lazaro cried at the beginning but "he shut up because she grabbed him by the neck so he would shut up" (Id). Then Ms. Cardona put him back in the closet (Id.). This incident occurred "like six or seven in the evening" (Id.).

This incident on October 31 is significant; even this Court recounted it in its direct appeal opinion. Cardona, 641 So. 2d at 362. This, however, is Gonzalez's account of the October 31 incident as told to the State investigators during her September 19, 1991 interview:

> According to Ms. Gonzalez, when she arrived home from work, everything was as usual. Taimi and Juanito were getting dressed to go out for Halloween. She noticed that Lazaro was in the closet gagged and bound but had no noticeable injuries. Ms. Gonzalez reports that she did not notice anything unusual because Lazaro was always tied in the closet.
>
> When Taimi, Juanito, and Olivia returned home, Ana Cardona, who had stayed home, was in bed watching television and Lazaro was still in the closet (as usual).

It goes without saying that her pretrial version of the Halloween evening (where she noticed nothing unusual) to the version she told the jury was 100% diametrically different. She told investigators that NOTHING happened on Halloween evening. NOWHERE in this (or any other

undisclosed) statement does Gonzalez discuss the supposed "plan" of Ms. Cardona's to "dump" Lazaro on Halloween.[16] The powerful impeachment that could have been conducted on Gonzalez had this statement been disclosed is evident. The difference between a key witness' "confidently described" testimony at trial and the witness' "initial perception of that event" which is inconsistent "suffices to establish the impeaching character of the undisclosed documents." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). As the Supreme Court long ago stated, "[t]he omission from the reports of facts related at trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." Jencks v. United States, 353 U.S. 657, 667 (1957).

At trial, the State also elicited from Gonzalez that she herself never hit Lazaro with a bat (R. 2933), and that she only told that to

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[16]The alleged "plot" that Ms. Cardona had to "dump" Lazaro on Halloween was the sole evidence that the State possessed as to premeditation:

> Okay, if you look at the evidence in the case, you're going to see in a way the defendant did mean to kill that child. She threatened again and again "I'm going to kill you," she told Olivia Gonzalez she planned on killing him and hiding him and killing him and dumping him before Halloween.

(R. 3360). The jury did come back with a question during deliberations on this very issue: "Please advise first degree murder, Count I, as is reflected on the jury verdict form opposed to felony murder, first degree" (R. 3414).

Mr. Slattery, the polygraph expert, because "they were pressuring me and telling me that I could have done it under the influence of the drug and not remembered it" (Id.) She only admitted to having hit Lazaro with the bat because she was "very nervous" and "under pressure" (Id.). On cross-examination, the defense attempted to impeach Gonzalez with her statements to the Slatterys admitting having struck Lazaro with a bat and in fact admitting that she could have hit him on November 1 and caused his death; she insisted, however, that those statements were made "under pressure" and she disavowed them (Id. at 2988). On her redirect, prosecutor Vogel got Gonzalez to definitively disavow having ever struck Lazaro with a bat:

> Q You hit Lazaro in the head with a bat?
> A No.
> Q During all those months prior to his death?
> A No.
> Q Do you know who did?
> A Yes.
> Q Who did?
> A She did.
>
> MS. VOGEL: Indicating for the record the defendant.

(R. 2993).

However, in her September 19 statement to the investigators, Gonzalez freely admitted to having abused Lazaro "on a daily basis" which items such as "a belt, a broomstick, a plastic bat, and a wooden bat." In her September 30 interview, she freely admitted that "she hit Lazaro with many objects. Ms. Gonzalez stated she recalls having hit Lazaro with her bare hands, with a belt, with a broom stick, and with a

wooden bat." She would "usually aim at Lazaro's feet" when she hit him but that "she might have hit Lazaro in other parts of his body, including his head." Again during this interview Gonzalez freely admitted:

> According to Ms. Gonzalez, she thinks she hit Lazaro at least two or three times with the wooden bat. Ms. Gonzalez is adamant about the fact that when she did hit Lazaro with the bat, Lazaro never bled, never lost consciousness or needed medical attention.
>
> * * *
>
> This writer specifically asked Ms. Gonzalez if she ever thinks she might have struck Lazaro with the bat so hard that she might have broken his limbs? Ms. Gonzalez stated that she doesn't think she ever broke either his arms or his legs. Additionally, Ms. Gonzalez reports that she never noticed any deformities in either Lazaro's legs or arms.
>
> Ms. Gonzalez reports that while they were living at 5976 S.W. 3rd Street, approximately one month before Lazaro's death, Ms. Gonzalez remembers having hit Lazaro with the wooden bat. According to Ms. Gonzalez, Ms. Cardona let Lazaro out of the closet. Ms. Gonzalez reports that she was "on drugs" and Lazaro started to bother her. Ms. Gonzalez was not able to be more specific; however, she recalls that she hit him with the bat. According to Ms. Gonzalez she does not remember in what part of Lazaro's body she hit him or how many times she struck him. After Ms. Gonzalez beat Lazaro with the bat, Ms. Cardona "Tied him up again, and threw him in the closet."

(Id.). It is clear that Gonzalez's protestations at trial that she only admitted to using a bat to hit Lazaro because she was "pressured" by the Slatterys were false;[17] she freely admitted such during her

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[17]Ms. Cardona has also alleged that the defense's failure to call the Slatterys at trial was prejudicially deficient performance. The Slatterys could have explicitly refuted Gonzalez's claims that she was

various undisclosed interviews with the State.[18] And because the State withheld these statements, Vogel was free to gain a double advantage: buttress Gonzalez's claim that she did not hit Lazaro in the last few months of his life while countering the defense's impeachment of her testimony:

> However, Olivia Gonzalez came in here and told you what her participation was. Defense counsel says to you "Oh well, you admitted to hitting him with a bat; right? Yes she did. She admitted to you, "Yes I did hit him with a bat **but she has told you, "I did not hit him in the last couple months of his life.**

(R. 3385) (emphasis added). Because the State's withholding of this critical evidence permitted the prosecutor to "intentionally paint[] for the jury a distorted picture of the realities of this case in order to secure a conviction," due process was violated. Davis v. Zant, 36 F.3d 1538, 1551 (11th Cir. 1994).

The withheld statements, as well as the simple fact that there was extensive State contact with Gonzalez, also would have provided the defense with an arsenal of information to argue that Gonzalez had been extensively coached and that her emotional state during her testimony, which resulted in the trial being recessed so that she could "control

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being "pressured" and "nervous."

[18]The State objected to Ms. Cardona's attempt to ask Zerquera about Gonzalez's demeanor during the interviews, and the lower court sustained (PCR. 1000-01).

herself" (R. 2885), was melodrama not actual emotion. When a particular witness is crucial to the State's case, evidence of coaching is especially material to that witness' credibility. Rogers v. State, 2001 WL 123869 at *10 (Fla. 2001). See also Kyles, 514 U.S. at 443 ("implication of coaching . . . would have fueled a withering cross-examination, destroying confidence in [the witness's] story"). The implication of coaching would have added a new source of bias for the jury to consider when weighing Gonzalez's credibility and testimony at both the guilt and penalty phases. Brown v. Wainwright, 785 So. 2d 1457, 1466 (11th Cir. 1986).

This withheld evidence as to Olivia Gonzalez, alone and in conjunction with the remaining errors described herein, warrant a new trial and/or a new sentencing proceeding.

3. MS. CARDONA ESTABLISHED A GIGLIO VIOLATION AS TO GONZALEZ. Due process prohibits the State from knowingly presenting false testimony. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). "This rule applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity." Williams v. Griswald, 743 F. 2d 1533, 1541 (11th Cir. 1984). In order to establish a Giglio violation, Ms. Cardona must establish that the testimony was used by the State, that the testimony was false, that the State knew or should have known that it was false, and that it was

"material to the guilt or innocence of the defendant." Id. at 1542. The "materiality" standard for a Giglio violation is whether the false testimony "could ... in any reasonable likelihood have affected the judgment of the jury." Id. at 1543 (quoting Giglio, 405 U.S. at 154). The standard for establishing a Giglio violation is less onerous than for a Brady violation. United States v. Agurs, 427 U.S. 97 (1976).[19]

At trial, Gonzalez was asked about any prior conversations she had had about this case. On direct, she testified:

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[19]Ms. Cardona is aware of this Court's recent opinion in Rose v. State, 774 So.2d 629 (Fla. 2000), where the Court wrote that "[t]he standard for determining whether false testimony is `material' under Giglio is the same as the standard for determining whether the State withheld `material' evidence in violation of Brady." Id. at 635. Most respectfully this Court's interpretation of the Giglio standard was erroneous. In Agurs, the Supreme Court explained that the post-trial discovery of suppressed information can give rise to several different legal claims. One type of claim occurs where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." Agurs, 427 U.S. at 103. In this type of situation, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. Unlike a Brady-type situation where no intent to suppress is required to be demonstrated, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." Id. at 104. Thus, although both Brady and Giglio require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. Thus, the standard for establishing "materiality" under Giglio has "the lowest threshold" and is "the least onerous." United States v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978). See also Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996) (Wells, J. concurring in part and dissenting in part) (discussing differing legal standards attendant to Brady and Giglio claims). Ms. Cardona submits that the analysis in Rose is erroneous and should be abrogated.

Q **Have you had conversations with other people about this case?**

A **No.**

(R. 2932) (emphasis added). On cross-examination, Gonzalez testified:

Q [] Now Miss Gonzalez, you recall that day you pled guilty to murder and pled guilty to aggravated child abuse was Friday, the 14th, Valentine's Day, correct?

A Yes.

Q **And at that time you had not had discussions with the prosecutors about your case; had you?**

A **No.**

(R. 2944) (emphasis added).

It is now known that Gonzalez's testimony was false and that it went uncorrected by the State. She was interviewed by State investigators on 3 occasions, months before her plea negotiation. Moreover, she spent a "couple of hours" with Vogel and Campbell "going over" her testimony (PCR. 952).[20] At the evidentiary hearing, prosecutor Vogel acknowledged that she was aware of her duty to correct testimony that was false, but refused to answer whether or not, based on the now-disclosed information, Gonzalez's denials of previous

[20]During closing arguments below, the State argued that there was nothing "secretive, hideous" about meeting with Gonzalez to go over her testimony (PCR. 1540). Ms. Cardona agrees. The constitutional issue here is not that Gonzalez met with the prosecutors to go over her testimony. The issue is that Gonzalez was explicitly asked if she ever spoke with anyone about the case and she said no, and her denial went uncorrected by the very prosecutor with whom she spent "a couple of hours" going over her testimony.

discussion about her case were truthful. She explained it was not her place to determine whether or not Gonzalez was telling the truth, and that she was not going to "crawl" into Gonzalez' head and answer the question whether Gonzalez's testimony had been truthful (PCR. 973-75).

However, "[t]he resolution of [capital] cases is not a game where the prosecution can declare, "It's for me to know and for you to find out." Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996). The law places an affirmative obligation on *the prosecutor* to correct testimony that he or she knows or should know is false. Id. at 1226. Vogel's obvious misunderstanding of her role in no way excuses her failure to correct Gonzalez's false testimony. In fact, her questioning of Gonzalez in the direct examination on this issue is quite interesting in light of what is now known about the extent of Gonzalez's discussions with the State. After Gonzalez denied talking to anyone about her case (R. 2932), Vogel quickly got her to acknowledge talking about her case to her psychologist and the polygraph experts (R. 2932-33). Yet Vogel does not question Gonzalez about talking with Zerquera and Mier about the case (knowing full well that she did so), thus leaving the jury with the "false and misleading" impression that Gonzalez may have "misspoke" in her initial denial but corrected the misimpression by acknowledging having talked with Haber and the Slatterys. Craig, 685 So. 2d at 1228. Vogel's careful questioning of Gonzalez only about Haber and the Slatterys demonstrates that she knew

that Gonzalez's denial was false, and that her failure to bring out the discussions with Zerquera and Mier could not have been anything but intentional because it would have revealed the extent of the contact between Gonzalez and the State.

Vogel's belief that it is up to the witness to tell the truth and that she had no duty to make an independent determination of whether Gonzalez's testimony is truthful eviscerates the underlying concern of Giglio and other cases, namely, that "deliberate deception *on the part of the prosecution* by the presentation of known false evidence is not compatible with the `rudimentary demands of justice.'" United States v. Antone, 603 F. 2d 566, 569 (5th Cir. 1979) (citation omitted) (emphasis added). Ms. Cardona does not have to ask Gonzalez whether or not she told the truth in order to establish her entitlement to relief, for the prosecution has a duty not to present false testimony and to correct testimony it knows or should know is false. This standard has clearly been met in Ms. Cardona's case.

In light of the obvious significance of Gonzalez to the State's case, Ms. Cardona has clearly met her burden of showing that the false testimony could in any reasonable likelihood have affect the judgement of the jury at both the guilt and penalty phase. The jury was unaware that Gonzalez, far from the tearful, remorseful, victim whose sole reason for coming forward was "[t]o cooperate in the truth" (R. 2813), was in fact a well-rehearsed, well-prepared, well-practiced witness who

had previously provided to the State completely different accounts of the events she attributed to Ms. Cardona. Relief is warranted.

C. BRADY VIOLATION REGARDING DR. HYMA. Unable to determine a "fatal" event which culminated in the death of Lazaro Figueroa, the State's theory was that he died as a result of repeated episodes of aggravated child abuse. To that end, Dr. Hyma testified that Lazaro died from child abuse and neglect, and that the brain injury was not the cause of death (R. 3302). This theory was repeated by the State in its closing argument. See R. 3360 ("clearly I don't think anybody is going to dispute that little baby Lazaro died from aggravated child abuse, there's no dispute about that"). The defense, however, did dispute this issue, arguing:

> We look at the medical examiner. We heard his testimony but what he says does not support Olivia's accusations against Ana, it supports our accusations against Olivia she hit the child with a baseball bat in the head while she was going for his feet, of course.

(R. 3343). In short, the issue of the definitive cause of Lazaro Figueroa's death was a matter of dispute.

During the evidentiary hearing, Det. Schiaffo identified a police report he authored dated November 3, 1990, regarding the results of the autopsy of Lazaro, which provided in pertinent part The report provided in pertinent part:

> In addition to these investigations, Sgt. Matthews and Det. Scrimshaw attended the autopsy to the victim (see Det. Scrimshaw's supplement). **Dr. Hyma advised that the cause of**

death was from trauma to the head further being a massive ceribal [sic] Hematoma to the front left lobe extending to the top of the skull. In addition the victim has his right arm broken.

(Id. at 1027-29) (Exhibit Q).

Below, Kassier explained that his goal in cross-examining Dr. Hyma was to try to establish that "that the most extreme blows and, in fact, the blows that actually at that time cause the death on that day, what blows inflicted at a period of time where Olivia was involved with the child" (PCR. 1136-37). The information contained in Exhibit Q regarding Hyma's conclusion that the cause of death specifically was the blunt trauma to the head was consistent with his strategy in challenging Hyma's findings at trial and penalty phase, and that he could have used the document to impeach Dr. Hyma at trial and penalty phase (Id. at 1140).[21] Kassier could not recall whether he had the document at the time of trial or not (Id. at 1139).

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[21]The State objected to counsel's questioning of Kassier as to the significance of Schiaffo's report, and the court sustained the objection (R. 1139). Collateral counsel thus proffered the testimony, which he submits should be considered at this time in assessing the materiality of the report. Of course, despite its objection when Ms. Cardona's counsel asked about Schaiffo's report, the State then asked Kassier questions about the report. Counsel objected and requested that he wanted his proffer to be in evidence now that the State was going into the same area (R. 1164). The court then required the State to proffer the testimony as well (Id.). During the State's proffer, Kassier reiterated that the information contained in Schaiffo's report was "consistent with one of the things [Hyma] said during the trial and inconsistent with another thing that he said during the trial" (R. 1165). Ms. Cardona submits that her proffer and the State's proffer should be fully considered by the Court.

The State's failure to disclose that Dr. Hyma originally opined that the cause of death was blunt head trauma, not aggravated child abuse, violated Brady. To the extent that defense counsel failed to secure Schiaffo's report, counsel was ineffective. Strickland v. Washington, 466 U.S. 668 (1984). Alone and in conjunction with the numerous other withheld documents in this case as well as the other errors, Ms. Cardona is entitled to a new trial and/or a resentencing.

D. BRADY VIOLATION REGARDING ELIZABETH PASTOR. Pastor testified that she knew Ms. Cardona for more than 15 years, and even knew her in Cuba (R. 2635). She witnessed Ms. Cardona and Gonzalez at various locations at different periods, and also observed Ms. Cardona and Lazaro; Lazaro did not appear to be well taken care of and one time appeared to have "a blow to one of his eyes" (R. 2644).

What the jury did not know was that the State had promised Pastor "consideration" for her testimony. At the time of her testimony, Pastor had been convicted of drug charges; however, the State promised, or certainly Pastor understood that the State had promised, "consideration" for her testimony, as the following letter from Pastor's attorney to Assistant State Attorney Jamie Campbell, introduced below as Exhibit F (PCR. 925), establishes in pertinent part:

> **I understand that Elizabeth Paster was completely cooperative and truthful in her testimony on the "baby Lollipops" murder prosecution and, further, it was her**

> **understanding that the Dade State Attorney's Office would make every effort to secure some consideration for her. As you know, she is currently serving a 15-year mandatory minimum sentence and she is certainly in dire need of some mitigation so that she may reclaim some part of her life.**
>
> Please contact me at your earliest convenience so that we may discuss this matter and so that a concentrated effort cab be made before the Broward trial court to secure a mitigation of Ms. Paster's sentence. As I have informed Ms. Paster, I will continue to represent her during this phase and I will of course make all of the arrangements and do everything necessary to optimize the effect of her cooperation.

In response, Campbell wrote a letter dated December 11, 1992, introduced as Exhibit G below (PCR. 925), to Broward Circuit Judge John Frusciante apologizing for not being able to attend Paster's sentencing hearing set for December 17, "but would like to apprise your honor of this defendant's cooperation in the recent prosecution in the Eleventh Judicial Circuit of Ana Cardona (90-48092)(A)(B)) for the First Degree Murder of her son, Lazaro Figueroa, better known as "The Baby Lollipops" case." The State's letter emphasized that Pastor provided "valuable information and insight" into Ms. Cardona, and her testimony was "very important because she was one of the last people to see Lazaro alive."

Because Pastor "was of great assistance in this very important homicide prosection," and the prosecutor "hope[d] that some consideration could be extended to her."

Campbell testified at the evidentiary hearing that Pastor was "very cooperative" with her, but she made no promises (PCR. 932). She

explained that she and Zerquera had gone to see Pastor at Broward Correctional Institution to talk to her about her testimony in Ms. Cardona's case and "to determine her demeanor" (Id. at 935). She wrote the letter to the Broward judge after Ms. Cardona's trial, but never talked with the Broward State Attorney's Office, she "just simply wrote the letter" (PCR. 934). Vogel testified she accompanied Campbell and Zerquera to interview Pastor (PCR. 957-58). Vogel identified a letter, introduced as Exhibit J, as a letter written by her to Pastor's attorney following the conclusion of Ms. Cardona's trial. In the letter, Vogel expressed her "appreciation for Ms. Pastor's cooperation" and wrote that he should feel free to call her "[i]f there is anything that we can do to assist you in the future" (Id. at 958). On cross examination, Vogel denied that she made any promises to Pastor (Id. at 960-61).

The materiality of the suppressed consideration given to Pastor is established by the very words of the State's letter acknowledging the importance of Pastor's testimony. The State made much of Pastor's importance during its closing argument at trial, particularly because she, in part, corroborated Olivia Gonzalez's testimony (R. 3375-77). This information was not disclosed to defense counsel, in violation of Brady v. Maryland, 373 U.S. 83 (1963). As demonstrated by the letters from Pastor's attorney, Pastor believed that the State would "make every effort" to secure consideration for her. The issue turns on what

Pastor was led to believe, not whether the State explicitly used the word "promise" when speaking with Pastor. A violation of the duty to disclose does not depend on the actual "words" used by the prosecutors, nor is the word "promise" "a word of art that must be specifically employed." Brown v. Wainwright, 785 F. 2d 1457, 1465 (11th Cir. 1986). The jury did not know that Pastor believed that if she cooperated with the State, she would be getting a benefit. Alone and in conjunction with the numerous other errors in this case, Ms. Cardona submits that a new trial and/or a resentencing is warranted.

E. FAILURE TO ADEQUATELY CROSS-EXAMINE DR. MERRY HABER.

1. Failure to Impeach with Gonzalez's Prior Criminal Record. Over defense objections,[22] the State was permitted to call in its case-in-chief Dr. Merry Haber, Gonzalez's psychologist. Despite having a wealth of information to impeach the underpinnings of Haber's testimony, defense counsel failed to employ the information they had. As a result, the cross-examination was anemic and failed to challenge Haber on some significant information.

Haber testified that Gonzalez was unable to leave the

[22]The defense objected to Haber's testimony because it was irrelevant and was being presented by the State solely to bolster the credibility of Olivia Gonzalez (R. 3017). The State argued that because the defense contention was that Gonzalez was the dominant figure in the relationship, they "opened the door" (R. 3018). The defense also argued that Gonzalez had already testified, and thus Haber would be "restating" what Gonzalez said on direct and thus would be repetitive (R. 3021). The court overruled the defense objections (Id.).

relationship with Ms. Cardona because she feared “that she would be rejected by her mother because Ana threatened to tell her mother she was a lesbian” and she was “afraid to lose her mother’s love” (R. 3030). Gonzalez also “felt that she was an unwanted child ... compared to her brother and sister” and was thus “constantly” seeking their “love and approval” (R. 3032). The defense, however, was aware that Gonzalez physically and violently battered both her mother and sister during the time she was living with Ms. Cardona, an event which hardly demonstrates Gonzalez’s concern about her mother’s and sister’s love, “approval” and emotional welfare at the very time she was living with Ms. Cardona. At the evidentiary hearing, Ms. Cardona introduced police reports from an incident on December 16, 1989, showing felony battery charges. On that date, Gonzalez's sister, Griselda Acosta, and Miriam Santana were walking across a Hialeah street when they spotted Gonzalez "attacking and striking" her mother, Miriam Rodriguez (Exhibit AA). According to police reports, Acosta and Santana approached Gonzalez, who then "started striking both with fists." The sister, Griselda Acosta, "was struck on the head, chest, and arms." Miriam Santana (who had a heart problem), "was punched in the chest and all over the body." Gonzalez’s mother, Miriam Rodriguez, was also struck by her daughter "with her fists." As Gonzalez was getting ready to leave, she "got a crow bar and smashed out the back window of [her sister's] vehicle." Gonzalez later called her mother and sister on the phone and said "she

was going to get them and kill them no matter where they went." Gonzalez also drove by her mother's house. This incident was clearly admissible to impeach Dr. Haber's opinion that Gonzalez was incapable of leaving the relationship with Ms. Cardona because of her fear of losing her mother's love if she found out she was a lesbian and her sister's approval because of her insecurities--the same mother and sister whose faces and bodies she was battering with her fists on a Hialeah street.

Dr. Haber also testified that Gonzalez suffered from "a dependent personality disorder" which consisted of a "long, enduring" pattern of dependent behavior, and that "[s]he had this before Ana Cardona and she'll have it long after" (R. 3037). Because of this, Gonzalez lacked "the strength of character to leave" the relationship with Ms. Cardona because "she's afraid to leave" (R. 3030). Gonzalez is the "victim in the relationship" who could "fight back but will never win" (R. 3029). Moreover, Haber told the jury that there was "no indication that [Gonzalez] participated in any antisocial behavior before meeting Ana and using drugs" (R. 3034).

Unbeknownst to the jury, however, Gonzalez's background in prior relationships completely contradicted Haber's portrayal of Gonzalez as the long-suffering "victim" as opposed to Ana Cardona, who Haber labeled the "lesbian queen" (R. 3031). Gonzalez apparently found her "strength of character" and overcame her "fears" when, on December 31,

1987 (over two years before she met Ms. Cardona), she was arrested for aggravated assault on her lover at the time, Doris Couto. According to this police report, introduced below as part of composite exhibit AA, Gonzalez and Couto were living together, and Gonzalez, during an argument, "pointed a hand gun at [Couto] and threatened her life." On December 26, 1988 (less than three months before she met Ms. Cardona), Gonzalez was again arrested, this time for battery on Doris Couto. According to this police report, part of exhibit AA, Couto stated that when she told Gonzalez she was moving out of the apartment they had been sharing, Gonzalez "got aggravated and started beating vict. with hands and striking vict's head on floor. Vict has large bruises about the right side of face." Thus, not only had Gonzalez engaged in “antisocial” behaviors before meeting Ms. Cardona, but engaged in conduct which hardly showed her “long-standing” inability to leave a relationship because she was and always would be a “victim” of battered spouse syndrome. These episodes would have eviscerated Haber's opinions about Gonzalez being dependent and passive and that she only exhibited violent behaviors when she was under the domination and influence of Ana Cardona, and would have been entirely consistent with the defense. The reality of Gonzalez’s actions utterly belie the portrayal of sad, lonely, and ugly Olivia Gonzalez as the unwitting

dependent battered "spouse" of Ana Cardona, the “lesbian queen.”[23]

During the evidentiary hearing, Kassier testified he had 2 primary goals in attacking Haber’s testimony: (1) that she had developed a “relationship” with Haber such that Haber “was buying into” Gonzalez’s story; and (2) that her opinion about Gonzalez and her relationship with Ms. Cardona “was inconsistent with what other witnesses would have reported” (PCR. 1132). Kassier recalled that there had been an investigation of Gonzalez’s background but could not recall specifics (Id. at 1131-32). He also could not recall if he knew of this information (Id. at 1134). Kassier would have had no reason not to question Haber about this during her cross examination.

Defense counsel’s failure to use this information to cross-examine Dr. Haber was deficient performance. Haber's testimony clearly opened the door for her to be confronted and impeached with Gonzalez's prior criminal acts which directly contradicted the underpinnings of her opinions. This Court has rejected time after time defendants' arguments that the State improperly elicited their criminal history when impeaching defense mental health experts. See, e.g. Mendoza v. State, 700 So.2d 670, 677 (Fla. 1997); Valle v. State, 581 So.2d 40 (Fla. 1991); Parker v. State, 476 So.2d 134, 139 (Fla. 1985). No different result obtains when it is a prosecution expert who has opened

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[23]Gonzalez herself should also have been confronted with the Couto incidents. Gonzalez told the jury that she and Couto got along "very well."

the door to being impeached.

Ms. Cardona was clearly prejudiced due to the failure to impeach Haber’s opinion. The essential defense theory was that it was Gonzalez, not Ms. Cardona, who inflicted the more serious abuse on Lazaro, and that Gonzalez was a dominating violent person. That theory, however, was severely undercut by Haber’s “expert” opinion. One only need to look at the State’s closing argument to establish that counsel’s failure to bring out Gonzalez’s criminal behavior toward her mother, sister, and former lover undermined confidence in the outcome. The State argued that Gonzalez has "nothing violent" in terms of criminal involvement until she met Ms. Cardona, and went on to belittle the defense attempts to downplay Gonzalez's purported fear of being "outed" by Ms. Cardona to her mother, calling it "absolutely ridiculous" (R. 3368-69; 3385-86). Counsel’s failure to impeach Dr. Haber with the powerful evidence of Olivia Gonzalez’s criminal behavior resulted in prejudice at both the guilt and penalty phases. Alone and in conjunction with the other errors contained herein, Ms. Cardona has established that confidence is undermined in both phases of her capital trial.

2. Failure to Impeach with Gonzalez's Prior Statements. Counsel also never aggressively cross-examined Dr. Haber on the statements that Gonzalez had made to George Slattery and Brian Slattery, the polygraphists. Counsel did question Haber about the fact that she

accompanied Gonzalez to interviews with the Slatterys, but asked not one question about the statements that Gonzalez had made to the Slatterys about her involvement in the death of Lazaro (R. 3042-44).[24]

Haber was present when Gonzalez confessed to Brian Slattery that she *killed* Lazaro Figueroa,[25] yet counsel never questioned Haber about

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[24]Counsel attempted one time to ask Haber about whether she had been aware that Gonzalez told Brian Slattery that she had hit Lazaro with a bat, but the State objected because it was "not part of her opinion" and the court sustained the objection (R. 3043). How Haber's failure to know that Gonzalez told Slattery that she had hit the boy with a bat was "outside" the scope of her opinion is a mystery, since the completeness of Haber's evaluation was at issue. On direct, Haber testified to spending some 37 hours interviewing Gonzalez (R. 3024), and although she was initially "afraid to be honest" she became over time more "emotional" and "easier to reach" (R. 3026). Moreover, because she lacked such inner-strength and was so dependent, Gonzalez would do things "she wouldn't normally do" such as "[b]eating the child" (R. 3034).

[25]After initially denying that she ever struck Lazaro with a baseball bat, Gonzalez confessed to Brian Slattery that "she was not sure exactly when she hit Lazaro with a bat last" (Deposition of Brian Slattery at 21) (Exhibit U), and that "she probably hit Lazaro that Sunday, and she also used the word October 28, 1990." Id. at 22. She said "she hit him with a bat, but she did not cause Lazarito's death," id. at 23, but then immediately stated that "Lazaro could have died after she hit him with the bat on Sunday, October 28th." Id. When Slattery asked Gonzalez if she was comfortable with this, "[s]he said yes." Id. Slattery then explained further that Gonzalez confessed that she could have killed Lazaro:

> That's when I confronted her or advised her that he was found motionless for the three days after that. That's when she, I guess, realized, that, you know, there was a problem there, as far as her conflicting in her original statement.
>
> That's when she told me, yes, she could have caused the

her statements. The fact that Haber did not know that Gonzalez, the "dependent" personality that she was, had confessed to the murder would have been significant impeachment of the basis for her opinion, particularly given that Gonzalez never admitted to Haber that she hit Lazaro in the head with a bat (R. 3044).[26] Haber's reaction to being

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> death, because he didn't move, and she didn't know if he was dead or not. Those are the times she saw him.
>
> She said that her initial story about giving him the bottle was not true, a bottle of milk, the day before he died.

Id. at 23-24 (emphasis added). Slattery further explained:

> A. Well, she told me, I guess the main thing is, that she did hit him before he was motionless now, those three days, and she did not know if he was alive or not. She saw him motionless, so therefore she could have caused his death.

Id. at 24-25 (emphasis added). At this point in the interview, Steve Hernandez, the investigator working for Bruce Fleisher, came in the room, and after Bruce Slattery showed him what Olivia had written, "he said, no, Olivia, you told me you didn't do it this date, so on and so forth." Id at 25. Gonzalez then became "confused or upset" and then said "it was a different date." Id. After Hernandez appeared to be "getting her a little more confused," Slattery wanted to "test her further on that to see if she was being truthful," but Hernandez "asked to terminate the interview." Id. The interview then terminated, and Slattery again asked Gonzalez in front of Steve Hernandez "if she was comfortable with what she told me, . . . and she said yes, she was not coerced, threatened, or anything like that." Id. at 26. Haber herself was present during this interview (R. 3044).

[26]Of course, counsel was precluded from cross-examining Haber on Gonzalez's admissions to Maria Zerquera and Ramon Mier, in the presence of Dr. Haber, as these interviews were suppressed. In her September 30 interview with Zerquera, Gonzalez freely admitted that "she hit Lazaro with many objects. Ms. Gonzalez stated she recalls having hit Lazaro with her bare hands, with a belt, with a broom stick, and with a wooden

confronted with such evidence would no doubt have had a powerful impression on the jury.

At the evidentiary hearing, Kassier testified that the inconsistencies between what Gonzalez told Haber and what she had told the Slatterys would have been something he would have wanted to fully explore at trial: "any time I can show that a material witness lied to the police, the State Attorney, to their own lawyer, to a polygrapher, to me, that is very critical evidence to get in front of a jury" (PCR. 1127). Yet no tactical decision was ever made not to impeach Haber with this information. When considered in conjunction with the other errors, it is clear that a new trial and/or a resentencing is required.

F. FAILURE TO PRESENT TESTIMONY OF GEORGE AND BRIAN SLATTERY.

In light of Haber's testimony opening the door to Gonzalez-Mendoza's prior criminal history and her statements to the Slatterys, defense counsel should also have called the Slatterys at the guilt phase of the trial yet, without a reasonable tactic or strategy, they failed to do so. While the Slatterys may not have been permitted to testify that the statements made by Gonzalez were made during the course of a polygraph examination and that she had failed, the overwhelming number of lies that Gonzalez told the Slatterys during their "interviews" with her should have been presented to the jury.

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bat." Gonzalez claimed that she would "usually aim at Lazaro's feet" when she hit him but that "she might have hit Lazaro in other parts of his body, **including his head**."

During the evidentiary hearing, Kassier testified that both George and Brian Slattery were listed as defense witnesses for the purpose of impeaching Gonzalez's testimony, but were not called because Gonzalez had already been impeached with her statements to George and Brian Slattery (PCR. 1176-78); moreover, calling the Slatterys would have precluded the defense from having two closing arguments at the guilt phase (Id. at 1179).[27] However, as Kassier acknowledged and as the record from trial demonstrates, Gonzalez was rehabilitated by the State in redirect, where she flatly denied ever having hit Lazaro with a bat at any time in the last several months of his life (PCR. 1188; R. 2993). Moreover, Gonzalez's undisclosed admissions to state investigators (where she was free from the "pressure" she supposedly felt during the Slattery interviews) openly admitting to striking Lazaro with the bat would also have impeached Haber and Gonzalez (PCR. 1188-89).

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[27]The lower court's order never discusses this purported strategy reason asserted by counsel. Ms. Cardona would note that while this strategic reason is sometimes reasonable, the reasonableness of the decision, like all tactical decisions, must be assessed in light of the whole case. "[A] criminal defense attorney may not fail to introduce evidence which directly exculpates his client of the crime charged for the sake of preserving the right to address the jury last in closing argument...." Diaz v. State, 747 So. 2d 1021, 1026 (Fla. 3d DCA 1999). "All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument." Id. Moreover, a blanket policy to protect both arguments by the defense is per se deficient. Cole v. State, 700 So. 2d 33 (Fla. 5th DCA 1997).

In light of the powerful evidence that the Slatterys could have provided to the jury, counsel's decision not to present them was unreasonable and prejudicial. The jury should have known that on July 24, 1991, October 2, 1991, and December 27, 1991, Olivia Gonzalez-Mendoza lied in great detail about her involvement in this case during "interviews" with "investigators" hired by her own lawyer, even when her own battered-spouse expert was present for comfort and support.

On July 24, 1991, Gonzalez was interviewed (and polygraphed) by George Slattery. The report dated July 31, 1991, introduced below as State's exhibit 2, details that Gonzalez "advised her attorney that she did not inflict the injuries which caused the death of the victim, and it was requested that this examiner attempt to confirm or negate her relevant statements in that regard, via the polygraph technique." After being informed that she had failed the polygraph, Gonzalez changed her story, admitting, inter alia, that "she had hit Lazaro with greater force than she had previously stated," that "she had also hit him with a shoe and with a two foot broomstick," that "when she beat Lazaro, she pushed him against a door and busted his lip, and also hit him with a bat, five times on his feet and thighs," that "she hit Lazaro with a bat just after moving into that efficiency, about two to three months before his death." Slattery's July report concludes by stating that "we were unable to clear Ms. Gonzalez-Mendoza on this matter."

George Slattery's deposition, introduced below as defense exhibit V, confirms the circumstances of this polygraph examination. During ar interview lasting almost 5 hours, Gonzalez maintained she had never hit Lazaro in the head with any object (G. Slattery depo at 15). According to George Slattery, "[m]y entire recollection of her is one of inconsistency. I think from the beginning there were contradictions back and forth. It became pretty evidence, she was just there to give self-serving statements from the get-go" (Id. at 25). In his opinion, "[s]he was trying to avoid the truth." Id. at 27. Significantly, as to Gonzalez's stories about Ms. Cardona hitting Lazaro over the head with a baseball bat, George Slattery opined that she was intentionally lying (Id. at 27-28). He testified:

> I think she was a phony, I think she was an actress. I think she intentionally flip-flopped and vacillated, because she wanted to maintain the support she was getting from her attorney, and the investigator, and Dr. Haber.

Id. at 42. He also described Gonzalez's demeanor as "amazingly calm" and "more like she was at a picnic than she was at a polygraph examination" (Id. at 29-30.

At the request of Bruce Fleisher, Gonzalez was again referred for another "interview" (polygraph examination) on October 2, 1991. This examination was conducted by Brian Slattery, and was requested because Gonzalez "was denying certain involvement towards, I guess you would word it, immediately before [Lazaro's] death. She was more or less blaming the other person, or they were pointing the finger at each

other. When I say each other, Ana and Olivia" (B. Slattery Depo at 8) (Defense Exhibit U). No written report of this polygraph was ever prepared because Slattery "was advised by the attorneys and the investigator, they were going to bring her back for further interviewing and hold off on anything until then" (Id. at 9).

George Slattery was "surprised" that Bruce Fleisher wanted a re-examination of Gonzalez-Mendoza because "the purpose remained[] to clear her . . . but each time she would make more incriminating statements against herself" (G. Slattery Depo at 35). He also commented on Dr. Haber's presence during the examination, stating that "it's the first and last time I'll have a psychologist or psychiatrist in my office, involved in an examination . . . [b]ecause I felt that Dr. Haber had a mindset that she believed Olivia, and that this was just a formality that they all had to go through." (Id. at 37).

During this examination, Gonzalez was asked whether she intended to truthfully answer all questions about when she last physically injured Lazaro Figueroa (she answered yes), whether, within two weeks of Lazaro's death, did she hit him with a baseball bat (she answered no), whether, within two weeks of Lazaro's death, did she hit him with any object (she answered no), and whether, within two weeks of Lazaro's death, did she physically cause Lazaro to be injured (she answered no) (Id. at 9-11). In Brian Slattery's professional opinion, "she answered the questions deceptively." After informing Gonzalez of these

results, she again admitted to hitting Lazaro with greater force than she had told him initially, and went into further detail (Id. at 12-15). Based on the story that Gonzalez had just told him, Brian Slattery then formulated another series of questions, such as whether she really saw Ana hit Lazaro with a bat after the last time that Olivia did (she answered yes), whether she was the last person to physically injure Lazaro before he died (she answered no), and whether Ana was the last person to physically injure Lazaro before he died (she answered yes) (Id. at 15). As to these additional questions, Brian Slattery concluded that there was "deception to all the questions" (Id. at 16).

After being told of these results, Gonzalez then told Slattery that "she was not sure exactly when she hit Lazaro with a bat last" (id. at 21), and that "she probably hit Lazaro that Sunday, and she also used the word October 28, 1990." Id. at 22. She said "she hit him with a bat, but she did not cause Lazarito's death" id. at 23, then stated that "Lazaro could have died after she hit him with the bat on Sunday, October 28th" (Id.). When Slattery asked Gonzalez if she was comfortable with this, "[s]he said yes" (Id.). Slattery then explained further that Gonzalez confessed that she could have killed Lazaro (Id. at 23-25).

Gonzalez was again examined by Brian Slattery on December 27, 1991. This time, the State took a role in discussions about the

polygraph examination, including the questions to be asked of Gonzalez. Assistant State Attorney Jamie Campbell sent a facsimile to Bruce Fleisher on December 19, 1991, with a set of questions for the upcoming "interview" (polygraph) (Defense Exhibit B). During the pre-testing interview for the December evaluation, Gonzalez started off by explaining that she was "tired and confused" at the October examination and she "takes back" the statements she made at that time (Polygraph Report, January 8, 1992, at 3) (State Exhibit 1). This time, Gonzalez told yet another version of what occurred during the final days of October, 1990, and the beginning of November, 1990. These statements again are contradictory to her trial testimony, prior statements to the Slattery's, and to the written proffer given to the State in September, yet most resembled the version she provided at trial. This time, Gonzalez's polygraph results were inconclusive as to some areas, such as whether she was the last person to physically injure Lazaro and whether she was lying when she said that she and Ana dumped Lazaro's body nine or ten days before his body was found. However, regarding whether she was lying when she said she saw Ana Cardona physically injury Lazaro after she (Olivia) did, the results indicated deception.

As to the circumstances surrounding this last polygraph, Brian Slattery explained in his deposition that it appeared as if Gonzalez was advised in advance that she was going to be examined again (B. Slattery Depo at 28). In going through the pre-testing interview,

Gonzalez again provided "different information" from previous examinations (Id. at 29). Slattery explained that "her main focus was on question number 45, she was not really concerned about any other question except that" (Id. at 31). Question 45 was the one question which she indicated deception on the results. Id. Slattery also explained that "it seemed like she had her mind made up on what she was going to say by the time she got there, all the way to the end, and that nothing else was going to happen." Id. at 34.

The jury at the guilt phase knew nothing of these statements made to the Slatterys. The trial court clearly had notified defense counsel that the Slatterys could be called in the defense case-in-chief. See R. 2990 ("Slattery is not her lawyer, whatever she said to Slattery is admissible....If Slattery was there, ask him"). However, trial counsel never entered the door that had been opened wide by Gonzalez and Dr. Haber. Given that the defense at trial was that Olivia did it, and that Olivia inflicted the last series of abuses toward Lazaro, counsel's failures severely prejudiced Ms. Cardona. Alone and in conjunction with the other errors asserted herein, Ms. Cardona is entitled to a new trial and/or a resentencing.

G. FAILURE TO REBUT BATTERED SPOUSE EVIDENCE. Despite the fact that the State was permitted to present the opinion of Dr. Haber that Gonzalez was a battered spouse, suffered from dependent personality, lacked the capacity to leave Ms. Cardona, and had nary an antisocial

moment in her life until meeting up with Ms. Cardona, defense counsel never sought to present any rebuttal to counter Haber's testimony as well as establish that Ana Cardona, not Olivia Gonzalez-Mendoza, qualified as the battered spouse in their relationship. This was prejudicially deficient performance.

At the evidentiary hearing, Kassier testified that although he and Gainor "felt the evidence indicated Olivia to be the more dominant or the stronger of the two persons in this relationship[,] ... in terms of presenting an actual defense based on elements of battered wife or battered spouse syndrome, no, we never fully investigated or explored that possibility" (PCR. 1123). Kassier acknowledged that it would have been "consistent" with the guilt-phase strategy, and would also have been something that would have rebutted Haber's testimony (Id. at 1123-24). It would also have been consistent with the strategy at the penalty phase (Id. at 1124).

On cross-examination, Kassier agreed with the State's question that the defense was "that Olivia Gonzalez was the batterer and not Ana Cardona" (Id. at 1158), and also agreed with the State's question that Ms. Cardona "did not complain about being a battered wife" (Id. at 1161). He agreed with the State's question that Ms. Cardona had never discussed this issue with Dr. Dorita Marina (Id. at 1170). He testified, however, that a battered spouse defense on behalf of Ms. Cardona would not have been "appropriate" because "we were not dealing

with a crime committed by Ana against Olivia" (Id. at 1171), and that there was "enough evidence" to support it" (Id. at 1173). In contradiction to his direct examination testimony and to his agreement with the State's initial inquiry on cross, Kassier then stated that a battered spouse defense would have been "inconsistent" with the defense strategy (Id. at 1173).

Despite counsel's varying explanations, a few important points are clear. As Kassier testified, this was not an issue that was "fully investigated or explored." Any subsequent strategy not to present a particular defense cannot be valid or reasonable absent full investigation. Williams v. Taylor, 120 S.Ct. 1495 (2000); Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991); Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993). Second, counsel's testimony when the State was cross-examining him that raising the battered spouse issue would have been "inconsistent" with the defense is flatly inconsistent with his direct examination testimony that it would have been consistent. Compare PCR. 1123-24 with PCR. 1173. Moreover, he agreed with the State's question that "that Olivia Gonzalez was the batterer and not Ana Cardona" (Id. at 1158). He also acknowledged that testimony that Gonzalez, not Ms. Cardona, was the battered spouse in the relationship would have contradicted Dr. Haber's testimony. Counsel's "strategy" is muddled at best and cannot provide a sound basis for shielding itself from scrutiny.

Counsel's agreement with the State that raising the battered spouse issue would be "inappropriate" because they were not dealing with a crime by Ana against Olivia ignores the reality of what the State was permitted to do at trial.[28] This claim cannot be viewed in a vacuum, but rather analyzed in context of the actual case. Had the State not presented the testimony of Haber that Ms. Cardona, "the lesbian queen," was the batterer and Olivia Gonzalez was her poor defenseless "victim," the State's point and counsel's strategy would have more merit. However, the State was permitted to present Haber's opinion that Ms. Cardona was a spousal batterer and Ms. Gonzalez was not, an unquestionably prejudicial opinion when the bottom-line issue in this case was who battered Lazaro Figueroa to death -- Olivia Gonzalez or Ana Cardona.

Although not a reason cited by the lower court in denying this claim, Ms. Cardona would note that counsel's final justification for failing to present this issue--that there was no evidence to support the theory that Ms. Cardona, not Gonzalez, was the victim of a battered spouse relationship--begs the question. The purported lack of adequate evidence is explained by the fact that, as he acknowledged, Kassier did not investigate or explore the issue. However, counsel clearly had a red flag provided by the pretrial experts appointed to evaluate Ms.

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[28]The lower court also latched onto this purported reason in its one-sentence denial of this claim (Supp. PCR. 934).

Cardona. Dr. Dorita Marina provided a report to Kassier, introduced below as defense Exhibit W, in which Ms. Cardona reported that as the relationship with Gonzalez went on, "[s]he began [] to fear Olivia who started to beat Ana up if Ana did not have sex with her. Olivia knew her weakness was the drug" (Exhibit W at 8). Kassier acknowledged that the report established that Ms. Cardona indeed told Marina that Gonzalez had abused her (PCR. 1182-83). Kassier also knew that Dr. David Nathanson, another of the defense experts, was of the opinion that Ms. Cardona, not Olivia Gonzalez, was the passive partner in the relationship. At the evidentiary hearing, Dr. Nathanson explained that Ms. Cardona "was really quite a dependent personality," was "fearful" of Ms. Gonzalez, and that she had told him during his examination that "a number of times she herself had been beaten by Olivia Gonzalez and that she was frightened of her and really quite dependent in every way" (PCR. 1231). Nathanson concluded that Ms. Cardona "was definitely a very passive, dependent personality with very little intellectual capability and she was frightened of Olivia" (Id. at 1233). Nathanson's opinions on this issue had been expressed at the time he evaluated Ms. Cardona prior to trial.

Ms. Cardona submits that she is entitled to relief. Had counsel presented the testimony of Dr. Nathanson, for example, the defense would have had a powerful argument that not only refuted Dr. Haber's conclusions, but also provided independent evidence consistent with the

defense theory that Gonzalez, and not Ms. Cardona, murdered Lazaro. Alone and in conjunction with the other errors, Ms. Cardona is entitled to a new trial and/or a resentencing.

H. FAILURE TO PRESENT "ABBOTT AVENUE" DEFENSE. Counsel unreasonably failed to present at trial and penalty phase the so-called "Abbott Avenue" information that was in their possession. Although due to page limitations Ms. Cardona is unable go into great detail about the specifics of this defense,[29] but in essence the defense was that a mentally-challenged babysitter named Gloria Pi, who resided at apartment 3A, 8030 Abbott Avenue in Miami Beach, confessed on November 28, 1990, to the murder of Lazaro Figueroa. During the course of her confession, Pi told detectives about certain details which detectives believed had not been made public, such as the child's diapers having been taped. Det. Matthews of the Miami Beach Police Department initially believed Pi to be a real suspect in the murder. After her confession, Pi and her mother were removed from their apartment and were repeatedly interrogated by detectives with the knowledge and participation of the Miami State Attorney's Office. Following her lengthy interrogations, Pi recanted and stated that she never babysat

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[29]The 3.850 motion did provide a lengthy discussion detailing the evidence of the defense and Ms. Cardona incorporates that discussin herein. At the evidentiary hearing Ms. Cardona proffered 20 folders of documents relating to the "8030 Abbott Avenue" defense that were marked for Identification as a composite defense Exhibit SS (May 18, 2000 Evidentiary Hearing, Afternoon Session at 677).

Lazaro Figueroa.

However, significant information corroborated Pi's confession and refuted her claim that she never babysat Lazaro. Mercedes "Mercy" Estrada, a resident of Apt. 2A at 8030 Abbott Avenue, reported that on October 30 **or** 31, 1990, she heard the screams and moans of a child coming for hours from the adjacent apartment 3A, with which she shared a common wall. She also stated that she heard objects being thrown against the wall, with enough force such that a picture frame on her wall fell. She said that she attempted to contact the police that night, and, depending on the account, either contacted them or did not. She stated that she believed that a young child, probably male, was being abused at that address. In any case, the Miami Beach Police did not respond that night. The next morning or on November 1, she called a child abuse hotline and made a report of this incident with H.R.S. of Florida.

HRS caseworker Rose Lesniak had been assigned to the case upon the arrest of Ana Cardona and Olivia Gonzalez. In a conversation with Ms. Cardona on May 17, 1991 (a visit not authorized by Ms. Cardona's attorneys), Lesniak learned that Gonzalez had been taking Lazaro to a babysitter in Miami Beach in 1990 whose name was Gloria and who was "fourteen, fat and retarded." During the course of her investigation, Lesniak also learned from Pi's mother, Joyce Valenzuela, that she and Gloria had in fact taken care of Lazaro at some time. In addition, a

witness named Karen Malave was deposed by trial counsel on February 28, 1992, right before Ms. Cardona's trial started. Malave reported that she had moved to an apartment 2 blocks north of 8030 Abbott Avenue the week of October 17, 1990. Malave confirmed that she knew Pi and her family, and that shortly after moving into the area, Malave talked with Pi and Pi discussed babysitting a small child or baby. Malave also spoke with Pi after her interrogation, and Pi stated that "she didn't mean to do what she did."

The trial record reflects that counsel represented to the court that they had not made a final decision about whether to use the Abbott Avenue defense as late as during the direct examination of Dr. Hyma, the State's final witness (R. 3222-24). At that point, Kassier informed the court that he expected the defense witnesses to take from a half day to a full day (R. 3222). At the conclusion of Dr. Hyma's testimony the next morning at 11:25, Kassier announced that the defense would be calling no witnesses. (R. 3309-12).

At the evidentiary hearing, Gainor acknowledged that the Abbott Avenue defense was a "very viable" one (PCR. 1053-54), but he and Kassier decided prior to the trial not to pursue it as a trial defense (Id. at 1052). The ultimate defense in the case was "just pointing the finger at Olivia where it deserved to be pointed, from our point of view, because we felt it was--she was the person that killed the child" (Id. at 1067).

Kassier explained that after he and Gainor took Olivia Gonzalez's deposition "the best strategy was going to be to indicate to the jury that Ms. Gonzalez was, in fact, the person who had caused the death of the child" (Id. at 1108). The picture they chose to portray of Gonzalez as the primary abuser dovetailed with the findings of the Medical Examiner that the abuse suffered by Lazaro coincided with the eighteen month time period that Ms. Cardona was involved with Gonzalez (Id. at 1136-37). He was unable to pinpoint, however, exactly when they ruled out presentation of the Abbott Avenue information (Id. at 1108-11).[30]

The issue of who struck the blows that the defense contended were the direct cause of death of Lazaro came up repeatedly at trial, but only in the context of Ms. Cardona vs. Ms. Gonzalez, not with reference to any third parties. For example, the defense asked the medical examiner if he could name the person who hit Lazaro in the head with a baseball bat and Dr. Hyma admitted that he could not (R. 3308). As noted above, only the State's cross examination of Dr. Marina at the penalty phase raised the possibility that there was another abuser in addition to either Ms. Gonzalez or Ms. Cardona.

I. FAILURE TO MOVE VENUE. Defense counsel unreasonably failed to

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[30]Depositions of some of the principle witnesses for the Abbott Avenue issue were not completed until March 2, 1992, just 3 days before jury selection began; one important deposition was not completed until March 11, 1992.

seek a venue change. Irvin v. Dowd, 366 U.S. 717 (1961); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991). Inflammatory media reporting surrounded Ms. Cardona's trial. Pervasive publicity about the "Baby Lollipops" case commenced from the discovery of Lazaro Figueroa's body in Miami Beach, and never ceased. In fact, the media began calling this case the "Baby Lollipops" case and this name never ceased; many people only recognized the case by the name "Baby Lollipops." Almost all of the venire panelists had heard about the "Baby Lollipops" case from media accounts, media accounts which were inflammatory and pervasive. Counsel's failure to seek a change of venue in this case was unreasonable, and relief is warranted.

J. FAILURE TO OBJECT.[31] Counsel failed to object to the inflammatory, irrelevant, and outrageous statements made by the prosecution during the closing arguments. For example, the State argued:

> Let me tell you something, folks, **once little baby Lazaro was born to Ana Cardona, once he was born to her, he was destined to die.** The existence of Olivia Gonzalez as the accomplice in this case really was incidental to the crime. **This child would have died at her hands whether Olivia Gonzalez was there or not.**

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[31]This claim was summarily denied by the lower court. Precedent makes clear, however, that the failure to object is a constitutional error which warrants an evidentiary hearing. Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995); Mordenti v. State, 711 So. 2d 30, 32 (Fla. 1998).

(R. 3361-62). Also:

> Who's going to be laughing at who. Is the defendant going to be laughing? It will be the defendant who will be laughing if she is convicted of anything less than first degree felony murder. That's going to be where you're hearing the laughter from.

(R. 3362-63). But the most pervasive and inflammatory thing about the State's closing argument was its persistent and intentional reference to the victim in this case as "little baby Lazaro." The State referred to the victim as "little baby Lazaro" no less than 35 times in closing argument with the intent of conveying the prosecutor's personal hatred for Ana Cardona and inflaming the jurors. Not once did the defense object to these references. Counsel's failure to object is puzzling given the fact that during the trial there was an objection and an *ore tenus* motion in limine to preclude the State from referring to the victim as "little baby Lazaro" (R. 2671). The Court observed that the Indictment charge referred to the victim as "Lazaro" and that the defense motion "is well taken" and ordered the State to "[j]ust call him Lazaro instead of little Lazaro" (R. 2671). Counsel failed to enforce their own motion in limine, and the State's use of "little baby Lazaro" no less then 35 times during its closing argument establishes its contempt of court orders and its defiant flaunting of the authority of the court.

Counsel also failed to object during an incident that occurred after the jury returned its guilty verdict. The record reflects that

as the judge was instructing the jurors about the upcoming penalty phase, an individual in the courtroom shouted out "They still say justice exists" (R. 3419). The Court then said "We don't need any gratuitous comments at this point" and went on speaking with the jurors (Id). The record then reflects again that the Court said "Quiet, ma'am" (Id.), then the Court ordered that the woman be removed by the bailiffs and that she could be held in contempt (R. 3420). After the jury was excused, the woman was brought back into the courtroom, when she told the judge that her name was Carmen Traya (R. 3420). She then explained that she was a person in the community who has been watching the news on TV and saw that "she was in court" (R. 3421). Ms. Traya went on that he had a son the same age as "hers," that she is troubled and "cannot understand why there are such evil people" (R. 3421). The Court then chastised the woman and told her to leave and never come back (R. 3421-22).

During the outburst when the jurors will still present, defense counsel did not object, and never sought any inquiry from the jury as to how the outburst may have affected the jury. Defense counsel never moved for a mistrial, nor moved for a new jury to be empaneled for the penalty phase. A jury's consideration of a pending case should not be subjected to nor influenced by any outside influences. Here, the jury was subjected to improper and inflammatory comments from a member of the public, only adding to the already overwhelming prejudice that had

accrued to Ms. Cardona during the course of her trial. Counsel's failure to object was unreasonably deficient performance.

ARGUMENT II--NO ADVERSARIAL TESTING AT THE PENALTY PHASE

A. INTRODUCTION. Ms. Cardona's sentencing jury returned a death recommendation by the narrow margin 8 to 4. The trial court found only one aggravator--heinous, atrocious or cruel [HAC] (R. 809). The court also found that Ms. Cardona was under the influence of extreme mental or emotional disturbance at the time of the offense, but did not attribute this finding to any noted mental illness or disorder, but rather to a decline in Ms. Cardona's lifestyle and use of cocaine (R. 803-04). The court also found that Ms. Cardona's capacity to appreciate the criminality of her conduct to the requirements of the law was substantially impaired; however, the court gave this finding little weight (R. 805-06). The court specifically found that most of the experts who testified "agreed that her IQ is borderline average" and that "the defendant is suffering from no major mental illnesses" (R. 806). The court specifically did not find that Ms. Cardona was acting under extreme duress or under the domination of Olivia Gonzalez, relying on the testimony of defense psychologist Dorita Marina regarding Ms. Cardona's self report statements to her about her substantial income from prostitution in making this finding (R. 804-05). The trial court disregarded the balance of Dr. Marina's testimony about Ms. Cardona's mental status. The trial court's order also

briefly described the non-statutory mitigation that was presented including Ms. Cardona's family history as a Mariel boatlift Cuban exile, and also described a sealed Florida Department of Human Resources (H.R.S.) report on the potential negative impact of Ms. Cardona's execution on her surviving children that the court "carefully scrutinized and considered" (R. 806-07). The order sentencing Ms. Cardona to death zeroed in on her drug use as the only credible mitigation and found that mitigation to carry little weight (R. 809).

In short, the order reflects the fact that while some statutory and nonstatutory mitigation was considered and found, it was given little if any weight; moreover, the finding of HAC is clearly premised on the lower court's belief that Ms. Cardona, not Gonzalez, murdered Lazaro, or at least was more responsible. See R. 800 ("While admitting her complicity in the crime, [Gonzalez] denied that she struck any fatal blows and that the serious injuries were inflicted by the defendant") 802 ("There was no reasonable doubt that [Ms. Cardona] was the primary participant in the crime"). As the record now establishes, death was imposed on Ms. Cardona without the trial court hearing about her mental retardation, organic brain damage, and the reality of Olivia Gonzalez and her relationship not only to Ms. Cardona, but to the murder of Lazaro Figueroa and her (at least) equal culpability in the

murder.[32] In light of the record as it now stands in this case, it is clear that Ms. Cardona is entitled to a new sentencing proceeding.

B. OLIVIA GONZALEZ'S INVOLVEMENT. In Argument I, Ms. Cardona set forth the violations of Brady and Giglio which occurred with respect to Gonzalez, as well as the extensive available evidence that was not used to impeach her or Dr. Merry Haber. Moreover, George and Brian Slattery had obtained confessions from Gonzalez to the murder of Lazaro Figueroa; no evidence as to these confessions was introduced. Ms. Cardona will not repeat herein all of these arguments; they are expressly incorporated herein by specific reference. Several matters of particular importance to the penalty phase, however, warrant some discussion.

The key feature of the state's penalty phase presentation--particularly the closing argument--concerned the relative participation in the crime between Ana Cardona and Olivia Gonzalez. The State argued that Gonzalez "was not the main abuser in this case" (R. 3760), that

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[32]In its order denying relief, the lower court wrote that the evidence was "overwhelming in that [Ms. Cardona] and her co-defendant, Olivia Gonzalez Mendoza, were the only two people in the world who had custody, control, and dominion over the dead child **and each or both were the only persons in the world who could have inflicted such damage upon a small child over so long a period of time as 18 months, which constituted one-half of this child's life**" (PCR. 934). This finding is essentially a finding of equal culpability, and should be contrasted to this Court's finding on direct appeal that "the record in this case supports the trial court's finding that Cardona was the more culpable of the two defendants." Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994).

her "participation was not as much as this defendant's in this case" (R. 3761), and that absent Gonzalez's testimony, there would be "very large holes" in the State's case as to the abuse inflicted in the last two months of the child's life (R. 3761-62). The central question of Gonzalez's participation in this case affects several penalty phase issues: relative culpability/disparate treatment, and the applicability and/or the weight of HAC.[33] Evidence was available to demonstrate that Gonzalez was in fact what Ms. Cardona had contended--a liar who only offered to help the State fill in the "very large holes" in the State's case to escape the electric chair. This evidence included polygraph interviews of Gonzalez by the Slatterys, the undisclosed interviews of by the state attorney's office, the proffer letter from Gonzalez's attorney, and several police reports documenting prior violent acts by Olivia directed at her relatives and girlfriends. Some of this information was suppressed by the State; some was known by counsel but never presented.

As noted, in sentencing Ms. Cardona, the trial found that Gonzalez denied striking the fatal blows to Lazaro,[34] and that Ms.

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[33]HAC cannot be applied vicariously if a codefendant is the actual killer. See, e.g. Omelus v. State, 584 So. 2d 563 (Fla. 1991); Archer v. State, 613 So. 2d 446 (Fla. 1993).

[34]Presumably the State will argue that it is irrelevant who struck the "fatal blow" because the cause of death was lengthy aggravated child abuse. This is why the withheld report of Detective Schiaffo is significant (Defense Exhibit Q), for it demonstrates that Dr. Hyma changed his cause of death from blunt force head trauma to the theory advanced at trial, which was long-term child abuse.

Cardona inflicted the "serious injuries" and was the "primary participant" (R.800-02). As conceded by the State, the most "serious" injuries were inflicted during the period when the couple was living ir the Piloto apartment, September and October of 1990. See R. 3381 (prior to September of 1990 "the abuse is not as bad as what we see in the medical examiner's photographs"). The only evidence that Ms. Cardona inflicted the most serious abuse in the last days and weeks of the child's life came from Gonzalez and only Gonzalez. Unbeknownst to the jury or the defense, Gonzalez had told state investigators that during that period at the Pilotos, she "hardly saw" Lazaro because he was "always" in the closet.

At trial, Gonzalez blamed Ms. Cardona for all of the serious injuries which occurred in that time period. She provided graphic testimony about an incident occurring on October 31, 1990, when Ms. Cardona "got pissed off and she hit him with a bat over the head" because Lazaro was slow in taking off his Pampers (Id. at 2897-99). After demonstrating the motion used by Ms. Cardona in swinging the bat, Gonzalez described in specific detail that "[a] hole was opened up in his head. His head was cracked" (Id. at 2899). The wound "started bleeding and bleeding and bleeding, and then I put mercury on it and I applied a plastic band" (Id. at 2900). She also testified that Lazaro cried at the beginning but "he shut up because she grabbed him by the neck so he would shut up" (Id). Then Ms. Cardona put him back in the

closet (Id.). However, in her undisclosed statement to state investigators, Gonzalez reported that nothing happened on Halloween night. Thus, Gonzalez's story at trial that Ms. Cardona inflicted a very serious injury on the night before the child's death could have been completely impeached. To be clear, Ms. Cardona is not arguing that abuse did not occur; rather her argument is that the most serious abuse and the fatal events were occasioned by Gonzalez. That Gonzalez would fail to mention this incident to the State yet in detail describe it to the jury certainly raises the specter that she, not Ms. Cardona, inflicted these blows, or that she had been coached by someone to say so.

Moreover, Gonzalez's trial version of the events of November 1, 1990, completely contradicted both her version in the undisclosed reports and the proffer. At trial, Gonzalez testified that she came home to find Lazaro in the closet and he was screaming because Ms. Cardona was coming behind her (R. 2902). Gonzalez took a bat and "confronted him" but Ms. Cardona "grabbed" it from her and "stayed with it" (Id.). Gonzalez then went to bathe, and when she came out of the bathroom, Ms. Cardona told her "I believe I killed him" (Id.). The obvious implication in this version is that Ms. Cardona killed Lazaro while Gonzalez was bathing. Yet in her September 19, 1991, interview with state investigators, she provided another version, this time reporting that she arrived home to find Ms. Cardona "screaming `He fell

off the bed.'" Gonzalez went to the closet and saw the child on the floor, motionless and badly beaten; when Gonzalez asked Ms. Cardona what had happened, Ms. Cardona said "I killed him, we have to throw him away." So in this version, Ms. Cardona killed Lazaro before Ms. Gonzalez arrived at home, instead of during her bath, and Ms. Cardona did not "grab" a bat from Gonzalez and "stay with it" as she said at trial. And in yet a third version, contained in the proffer to the State, Gonzalez reports that she arrived home to find Ms. Cardona "in a crazed state of hysteria and perhaps under the influence of drugs." Gonzalez saw Lazaro in the closet and he was still, rigid, and she thought he was dead; Ms. Cardona did not know if the child was dead, and suggesting they bring him to a wealthy neighborhood "where someone could perhaps revive him and take care of him." This version, which is the earliest in chronology of her numerous versions, is the most mitigating in the sense that there is no direct attribution of a fatal blow by Ms. Cardona,[35] and that it was Ms. Cardona who suggested taking

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[35]In fact, this original version is entirely consistent with her confession to Brian Slattery. During her second polygraph, Gonzalez admitted that on October 28, 1990, she hit Lazaro with a bat, that in the ensuing days she did not see Lazaro move from the floor of the closet, and that Lazaro "could have died after she hit him with the bat on Sunday, October 28th" (Depo of B. Slattery at 22-24). It was at this point in her interview with Slattery that Bruce Fleisher's investigator interrupted and said "no, Olivia, you told me you didn't do it this date" and Gonzalez became "confused or upset" (Id. at 25). Slattery sat down with all of them and went through the dates again, and Gonzalez said she was "comfortable" with her answers; but the investigator again interrupted and the interview was terminated.

the child to someone who could help him. Not surprisingly, and why all of this information is vital in this case, is that this most mitigating version significantly changed over time as Gonzalez met with state investigators, secured her deal to avoid the death penalty, and met with prosecutors for several hours before her trial testimony. This too establishes the importance of the State's failure to correct Gonzalez's false testimony that she had never talked with the prosecutors about her case; the jury never knew that in Gonzalez's various versions of events she had increasingly shifted the responsibility for killing to Lazaro to Ms. Cardona and away from herself. This is a classic Giglio violation.

In addition to the Brady violations, Ms. Cardona also alleged in Argument I that counsel failed to effectively impeach Dr. Merry Haber and failed to call the Slatterys. These claims apply equally to the penalty phase. The State urged the jury at the penalty phase to "remember" what Dr. Haber had told them about Gonzalez: "Dr. Haber told you that the person who was being controlled was, in fact, Olivia Gonzalez. Not the defendant" (R. 3750). Of course, Dr. Haber was never cross-examined about Gonzalez's violent and abusive acts toward her previous lover, which occurred long before she met Ana Cardona. Dr. Haber was never cross-examined about Gonzalez beating her mother with her fists on a Hialeah street. Moreover, the defense never called the Slatterys to testify to Gonzalez's confessions. All of these

issues discussed in Argument I apply to the penalty phase and establish that no adversarial testing occurred.

C. IMPROPER USE OF MENTAL HEALTH EXPERTS. This Court on numerous occasions has held that defense counsel is not ineffective for failing to present evidence that is inconsistent. See, e.g. Cherry v. State, 25 Fla. L. Weekly S719 (Fla. 2000); Rivera v. State, 717 So. 2d 477 (Fla. 1998); Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993). In Ms. Cardona's case, the Court is faced with the question of whether the Sixth Amendment is satisfied when counsel affirmatively presents inconsistent theories, thereby depriving the defendant of a coherent defense which can withstand attack from the State. Ms. Cardona submits that counsel's presentation of mental health experts who contradicted each other on the stand violated the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984); Ake v. Oklahoma, 470 U.S. 68 (1985).

During the penalty phase, the State presented four witnesses: the medical examiner (R. 3523-35); psychiatrist Dr. Anastacio Castiello (R. 3567-91); Dr. Lazaro Garcia, a psychologist (R. 3705-45); and Dr. Gary Schwartz, another psychologist (R. 3746-51). Of these witnesses, Dr. Garcia was called by the State at the evidentiary hearing (Pages 612-669, Transcript of Afternoon Session of Evidentiary Hearing, May 18, 2000).[36] The defense called only two witnesses at the penalty phase:

[36]This portion of the evidentiary hearing was mislabeled April 18, 2000, and the clerk failed to include it in the record for purposes of this appeal. A motion to supplement the record with it will being

psychologist Dr. Alex Azan (R. 3537-61), and psychologist Dr. Dorita Marina (R. 3619-3703). At the evidentiary hearing, Ms. Cardona called Dr. David Nathanson, a psychologist specializing in neuropsychology who had been retained by trial counsel and had evaluated Ms. Cardona several times, and Dr. Ricardo Weinstein, a neuropsychologist retained by Ms. Cardona's collateral counsel.

The penalty phase experts presented by the defense provided totally inconsistent conclusions about Ms. Cardona's mental illness. The first witness called at the penalty phase was Dr. Azan.[37] Azan testified that he administered a Spanish MMPI[38] examination to Ms. Cardona, but he had to read it to her because of her poor reading ability. His response to the question as to whether this method of administration affected the validity of the results was "[i]t has been done before" (R. 3546). Ms. Cardona sometimes had trouble understanding (R. 3547). Further, he testified that the elevated "F" scale results he got on the MMPI he administered to Ms. Cardona would normally invalidate the test (R. 3552-53). Dr. Azan testified that

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filed.

[37]Azan was deposed prior to Ms. Cardona's trial, at which time he testified that Dr. Nathanson, not Mr. Kassier, contacted him regarding Ms. Cardona. Nathanson suggested that he give Ms. Cardona the Minnesota Multiphasic Personality Inventory (MMPI), and that he, Azan, had never done any forensic work as a private practitioner until Nathanson asked him to see Ms. Cardona. He also stated in his deposition that he did not interview Ms. Cardona, but only administered the Spanish version of the MMPI (PCR. Supp. 817-18).

[38]The MMPI is the Minnesota Multiphasic Personality Inventory, a projective test used to evaluate personality traits.

based on his examination and interaction with Ms. Cardona, he "did not think that she was schizophrenic" (R. 3559). The State's cross-exam of Dr. Azan was brief, consisting of a few questions about the MMPI, and then getting Azan to reiterate that Ms. Cardona gave no indications of suffering from schizophrenia (R. 3561).

The next witness, Dr. Marina, testified that she was unable to complete the MMPI with Ms. Cardona because her reading level in Spanish was "inferior" and there was not enough time for her to read all the questions to Ms. Cardona (R. 3628). She gave Ms. Cardona a Wechsler Adult Intelligence Test-Revised (WAIS-R) and staed that although the verbal score, 67, was in the retarded range, she believed that Ms. Cardona was of borderline intelligence rather than mentally retarded (R. 3623, 3636-37). Finally, Dr. Marina testified that based on her administration of the Rorschach test she believed that Ms Cardona was suffering from the major mental illness of schizophrenia (R. 3640-52). Based on her opinion that Ms. Cardona suffered from schizophrenia, Dr. Marina opined that Ms. Cardona's capacity to appreciate the criminality of her conduct was substantially impaired, that her ability to conform her conduct to the requirements of the law was substantially impaired, that the acts that she was found guilty of occurred at a time when she was in a state of extreme duress, and that she was under the influence of extreme mental or emotional disturbance (R. 3652-53).

On cross-examination, Dr. Marina admitted she had never talked to

Dr. Azan and was thus unaware of his finding that Ms. Cardona was not schizophrenic (R. 3670). Based on the definition of schizophrenia set forth in the Diagnostic and Statistical Manual for Mental Disorders, the State impeached her diagnosis of Ms. Cardona as schizophrenic (R. 3675-78). She also acknowledged that she had not reviewed a wealth of information about the case, information that was readily available, such as Ms. Cardona's statements to the police, witness depositions about the relationship between Ms. Cardona and Olivia Gonzalez-Mendoza, jail records of Ms. Cardona, or any independent documentation about Ms. Cardona (R. 3692-95). She believed Ms. Cardona had been under the influence of cocaine "most of the time", 24 hours a day, 7 days a week for the 18 months prior to her son's death, but conceded that "it would be very difficult to prove" (R. 3682). Finally the State extensively questioned her findings of statutory mitigation (R. 3695-96).

Needless to say, in light of Azan's testimony that Ms. Cardona was not schizophrenic and Dr. Marina's testimony that she was, the defense's totally inconsistent presentation was the highlight of the State's closing argument. The defense's inconsistent presentation allowed the State to argue that Dr. Marina was "the only person" who testified to statutory mitigation and was not credible:

> You were able to observe the way she testified and what she based her opinions on.
>
> You observed the cross-examination of Dr. Dorita Marina when her entire theory crumbled before you.

> She was saying to you that this defendant was schizophrenic.
>
> Well, none of the doctors who came in here, and there were four other doctors who came in here, observed any kind of schizophrenia in the defendant.
>
> Even the defendant's own doctor, Dr. Azan, came in here and told you he did not observe any schizophrenic behavior from that defendant.

(R. 3757-58). See also R. 3759 ("[Dr. Marina] crumbled before you on cross-examination. Finding the defendant schizophrenic when no one else who came in here has ever found her schizophrenic"). The court eventually disregarded Marina's opinions as to the applicability of statutory mitigating factors (R. 806) ("The Court is convinced that the defendant is suffering from no major mental illnesses").

Had defense counsel only had Marina and Azan in his arsenal of potential experts, his decision to call them could be, to some extent, more understandable. What makes this case different is that counsel had at his disposal an experienced mental health expert who would have provided a wealth of significant statutory and nonstatutory mitigation to the jury without the baggage of inconsistencies that plagued Azan and Marina which were fatal to the credibility of the penalty phase case.

Dr. David Nathanson, who had been appointed to assist the defense, testified at the evidentiary hearing that he received his Ph.D. in 1973, and thereafter focused on cognitive function and brain injury (PCR. 1195). He had a "significant" amount of training in

neuropsychology both as a doctoral student and in continuing education during his career (Id.at 1196). At the time of Ms. Cardona's trial, Nathanson was doing forensic evaluations for Dade, Broward, and Monroe counties, was a full tenured professor in the Florida state university system, and doing a dolphin therapy program utilizing dolphins to work with disabled children (Id. at 1204). Overall in his career as a forensic examiner he conducted between 50 and 100 evaluations (Id. at 1206). Nathanson had been asked by Kassier to evaluate Ms. Cardona to determine if there was "any information that might be useful in presenting a defense for her, including her cognitive competence" (Id. at 1208-09). To that end, he administered a number of neuropsychological screening tests and, based on those tests and his initial consultation with Ms. Cardona, he recommended further examination, both neuropsychologically and in personality assessment" (Id. at 1211).[39] Ms. Cardona's cognitive skills were "very poor" and she "appeared to be functioning in the moderate to mild range of mental retardation with an estimated IQ to 55 to 70" (Id.). Nathanson communicated his conclusions and concerns to Kassier (Id. at 1212).

During his second evaluation of Ms. Cardona, Nathanson made

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[39]Specifically, Dr. Nathanson's report indicated that Ms. Cardona "needs further examination both neuropsychologically and in personality assessment," was "clearly functioning cognitively in the mentally retarded range," had "an infantile, passive, and poorly developed personality," and was "likely to be easily led and manipulated" (Defense Exhibit Z).

additional findings with respect to her cognitive skills, namely that "there was significant cognitive impairment, probably due to some sort of brain damage" (Id. at 1214). He then wrote a report and provided it to Kassier (Id.; Defense Exhibit X)

Nathanson was asked by Kassier to conduct another interview with Ms. Cardona (Id. at 1215). During this examination, Nathanson administered a spanish version of the WAIS intelligence test, which revealed "extreme scattering in the scaled scores" (Id. at 1217). The extreme scatter confirmed his earlier impression that Ms. Cardona's intellectual functioning was very poor "as a result of factors other than lack of education" (Id. at 1218). He also administered portions of the Luria Nebraska Neuropsychological battery, the results of which were "consistent with the distorted function" on the previous brain damage testing (Id. at 1219). However, the recommendation he had made to Kassier for a full neuropsychological battery was never followed up on (Id. at 1233-34). At no time in his evaluation did he think that Ms. Cardona suffered from schizophrenia, and was not aware at the time of his evaluations that another expert had come to that conclusion, although he has since become aware of it (Id. at 1234).

Nathanson testified below that he would have been able to testify at the time of trial that there were "clear indications to me that there was organic brain damage" but that he would have been "much more comfortable if a complete neuropsych batter could have been given to

her" (Id. at 1235). In terms of mental retardation, Nathanson would have been "perfectly comfortable" testifying at the penalty phase that Ms. Cardona "falls at worse in the moderate range of retardation and at best in the mild range" (Id.). He explained that his conclusion was not based solely on the IQ scores, but "on the entire context of everything that I did with Ana" (Id. at 1236). For example, in terms of her adaptive skills, Nathanson was aware that Ms. Cardona was a prostitute, but that based on his review of the records and his interview, she was not someone who was running a prostitute ring but rather "being prostituted" (Id. at 1238). He explained that she was "easily convinced, easily persuaded in any relationship" and "would be the passive person" (Id.). Along those lines, Nathanson also opined that in terms of her relationship with Olivia Gonzalez, Ms. Cardona was "quite a dependent personality, was fearful of Ms. Gonzalez," and "had been beaten by Olivia Gonzalez and that she was frightened of her and really quite dependent in every way; emotionally, financially" (Id. at 1231). Her dependency on Gonzalez for transportation (Ms. Cardona could not drive), and for drugs, money (Ms. Cardona was unemployed), and sex supported his findings of passivity and adaptive problems related to her mental retardation (Id. at 1306).

Had he been asked at the time of the penalty phase, Dr. Nathanson would also have opined that Ms. Cardona was operating under a severe mental and emotional disturbance at the time of the death of her son

(id. at 1241), and that her ability to appreciate the criminality of her conduct or to conform her conduct to the law was substantially impaired (Id. at 1242). Dr. Nathanson testified his findings in 1992 were consistent with the Florida Department of Corrections diagnoses of Ms. Cardona, major mental illness on Axis I DSM of recurring major depression, and dependent personality disorder, both memorialized in a document he identified on the stand dated September 16, 1999 and introduced by the State at the evidentiary hearing (Id. at 1333-34).

Ms. Cardona also presented at the evidentiary hearing a Spanish-speaking neuropsychologist licensed in California, Dr. Ricardo Weinstein, to undertake a complete neuropsychological evaluation of Ms. Cardona. Weinstein explained his educational background, including his doctoral degree, a master's degree, and post-doctoral training in neuropsychology (Id. at 1354). He has previously been qualified in both state and federal courts over 100 times as an expert in psychology (Id. at 1357). Weinstein testified that he was doing neuropsychological testing in 1992 at the time of Ms. Cardona's trial and would have been qualified to do such testing (Id. at 1370).

Weinstein testified that he spent approximately 15 hours with Ms. Cardona, testing and conversing in Spanish (Id. at 1377). He also reviewed numerous background materials (Id. at 1376; Defense Exhibit LL). Most of that time was spent in administering tests that he described as "a full neuropsychological evaluation, evaluating

cognition, intelligence, evaluating memory, evaluating attention, evaluating motor skills, sensory skills, executive function" (Id. at 1378). In his opinion Ms. Cardona was giving her best effort and was not malingering (Id. at 1379).

Based on his testing and evaluation, Weinstein concluded that Ms. Cardona does suffer from mental retardation (Id. at 1382), and noted that there was a lot of consistency between his scores and those obtained by the other experts who had evaluated her (Id. at 1385). He found her IQ score to be 52 (Id. at 1384). Functionally, Dr. Weinstein opined that Ms. Cardona falls in the mild retardation level (Id. at 1385); intellectually, she functions as an 8 year old (Id. at 1386). Dr. Weinstein further testified that he concluded from the results of his evaluation that Ms. Cardona suffers from organic brain dysfunction or brain damage (Id. at 1387-94).

Weinstein also explained that, based on his evaluation and her history, Ms. Cardona did not suddenly transform herself from being a dependent personality to being the "abuser" of Olivia Gonzalez (Id. at 1394). Ms. Cardona was not in a position or have the skills to be able to leave the relationship; her history demonstrated that "she has always been terrified of being on her own, always dependent on somebody else; she has the knowledge and awareness that she can't do it on her own" (Id. at 1399). Weinstein had the opportunity to speak with Elizabeth Pastor, who knew Ms. Cardona from Cuba (Id. at 1405). Pastor

explained that many people took advantage of Ms. Cardona, including Pastor herself, in that "they use her and have used her in order to procure for themselves, money and drugs, by prostituting her" (Id. at 1405). Pastor's account was consistent with Ms. Cardona's history and his own findings (Id.) It was also consistent with one of the "most relevant" factors, that being Ms. Cardona's drug addiction: "she was depending on someone else to provide her the drugs. . . She was using her body to get the drugs" (Id. at 1400). Ms. Cardona's drug usage "would cause serious damage to the brain" and "would cause a person not to be able to actually be functioning in reality" (Id.). Like Dr. Nathanson, Weinstein saw no indication that Ms. Cardona was schizophrenic, other than Dr. Marina's report, and he faulted the report for basing a diagnosis of schizophrenia solely on a Rorschach test (Id. at 1401-03). The Rorschach lacked the reliability and validity for forensic purposes, particularly when it is used as the sole diagnostic tool (Id. at 1403).

Weinstein also testified that Ms. Cardona did not have an antisocial personality disorder (Id. at 1404). Other than the experts who evaluated Ms. Cardona for the State at the penalty phase, he has seen no other medical or psychological report diagnosing Ms. Cardona as an antisocial personality. In fact, Weinstein noted that even the Department of Corrections had never diagnosed her with that disorder

(Id. at 1404).[40]

Based on the evidence adduced below, it is clear that counsel performed deficiently and that Ms. Cardona was substantially prejudiced. Attorney Kassier, who was primarily responsible for the preparation of the penalty phase (Id. at 1107), testified that his strategy at the penalty phase was to establish both statutory and nonstatutory mitigation (Id. at 1141). He also hoped to establish that Ms. Cardona suffered from a major mental illness (Id. at 1144). He recalled that Dr. Marina's diagnosis was that Ms. Cardona was schizophrenic, and that her report also indicated that Ms. Cardona had indicia of organic brain damage (Id. at 1144).[41]

Kassier also recalled that he wanted to call Dr. Azan "basically to corroborate Dr. Marina's finding" (Id. at 1145). However, Azan was "a mixed bag" in that he was not completely positive of the accuracy of his test results (Id.). Kassier could not recall "offhand" if Azan agreed with Dr. Marina about the diagnosis of schizophrenia (Id.).

Kassier explained that Nathanson was originally retained by Ron

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[40]The Department of Corrections diagnosed Ms. Cardona as suffering from a major, Axis I, mental illness: recurring major depression (PCR. 1332-34) (Defendant's Exhibit 2F). Evidence was also presented at the evidentiary hearing that only months after Ms. Cardona was sentenced to death, the Department of Corrections classified her as "moderately impaired, adaptive functions require continuing outpatient care by psychiatry and psychology staff" (Id. at 1419, 1450-51) (Defense Exhibit 2G).

[41]Dr. Marina's report was introduced below as Defense Exhibit W (PCR. 1143).

Gainor (guilt phase counsel) (Id. at 1146). Nathanson's conclusions were "much stronger on the evidence of her being mentally retarded...rather than reaching a conclusion that she was schizophrenic" (Id.). Kassier acknowledged, after looking at Nathanson's reports, that he also found that Ms. Cardona suffered from brain damage (Id. at 1148), and that she was "dependent in many respects on Olivia Gonzalez" (Id. at 1149). This information about the relationship with Gonzalez was consistent with the defense theory in the case (Id.).

On cross-examination, Kassier explained that one of the reasons he chose Dr. Marina to testify was that she was a Cuban female and was more experienced in testifying in court than Dr. Nathanson (Id. at 1166). Kassier was also aware that the State had a number of experts who were prepared to counter any evidence of mental retardation (Id. at 1168-69). The prosecutor then asked the following series of questions establishing that the last thing a defense attorney in a capital case would want to do would be present inconsistent diagnoses:

> Q Now, it would have been unwise for you to put on Dr. Marina and Dr. Nathanson together? Wouldn't that be fair to say?
>
> A I'm sorry. I didn't hear you. Did you say wise or unwise?
>
> Q Unwise. Tactically speaking.
>
> A I believe it would have been, yes.
>
> **Q That was because they had really an**

inconsistent diagnosis of Ana Cardona? Correct?

A Yes.

Q When you put on an inconsistent diagnosis that leads to a jury perhaps losing--you losing credibility before a jury? Wouldn't that be fair to say?

A Yes.

Q And that is not a good tactical thing to do in a death phase for a first degree murder case? Wouldn't you agree?

A Not in any case, but especially not in a case of this magnitude.

(Id. at 1170) (emphasis added).

Ms. Cardona agrees wholeheartedly with the prosecutor's point, which establishes the deficient performance in this case. Counsel *did* put on 2 experts who flatly contradicted each other, one saying Ms. Cardona was schizophrenic, the other saying she was not. In the prosecutor's own words, counsel's decision to call Marina and Azan was "unwise, tactically speaking." Ms. Cardona is not nor has she ever claimed that counsel should have presented Dr. Nathanson in addition to Marina and Azan; that would only have added more layers of inconsistencies. Rather, her contention is that, faced with the choice of experts, counsel made an unreasonable decision to present experts who contradicted each other rather than Dr. Nathanson, whose conclusions were not inconsistent and were fully supported by testing

and a complete evaluation.[42] The choice of Marina and Azan over Nathanson constituted prejudicially deficient performance.

The lower court found that "defense counsel chose the doctors to testify which were in line with their strategy of showing that the defendant was schizophrenic and not either antisocial or mentally retarded" (Supp. PCR at 934). This finding lacks record support, demonstrates that the court did not understand the issue, and is due no deference. Stephens v. State, 748 So. 2d 1028 (Fla. 1999). Counsel's strategy was not to show that Ms. Cardona was "schizophrenic," or that she was "not mentally retarded" but rather that she suffered from a major mental illness which warranted a finding of statutory and nonstatutory mitigation. Counsel acknowledged that Nathanson's conclusions were "much stronger on the evidence of her being mentally retarded...rather than reaching a conclusion that she was schizophrenic" (PCR. 1145). Counsel did not "decide" not to use Dr. Nathanson because he found mental retardation; rather, he did not use him because he did not find Ms. Cardona to be schizophrenic. Of course, Dr. Azan, who was presented *before* Dr. Marina, also testified that Ms. Cardona was not schizophrenic. Thus, because of the failure to call Nathanson as opposed to the Azan/Marina combination, counsel

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[42]Counsel did, however, fail to follow up on Nathanson's recommendation that further neuropsychological testing be conducted. Dr. Weinstein conducted such testing and provided corroboration for Nathanson's initial opinion, based on screening tests, that Ms. Cardona suffered from brain damage.

armed the State not only with the ability to attack the defense as inconsistent, but also the ability to present its own evidence that Ms. Cardona was not mentally retarded with no defense expert to refute that claim.

The court's order completely ignores the fact that Marina and Azan provided totally inconsistent conclusions among themselves. Counsel's purported strategic reason for not calling Dr. Nathanson --that his diagnosis was inconsistent with Marina's--is undermined by the fact that he called Azan, whose opinion, just like Dr. Nathanson's, specifically contradicted Marina's opinion that Ms. Cardona was schizophrenic. The trial court conducted no independent review of this record, but rather simply believed that if counsel testified to some strategy, the inquiry was at an end.[43]

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[43]On numerous occasions, the lower court exhibited a lack of understanding of collateral proceedings. For example, despite granting an evidentiary hearing on the penalty phase issue, when counsel began presenting the testimony of Dr. Nathanson, the court asked counsel why he was presenting him because "[i]t seems that Mr. Kassier said why he did not testify" (PCR. 1197). Counsel argued that he needed to prove what Nathanson would have said if he had testified, to which the court responded "Well, I guess you could bring in a lot of doctors who could say what could have been, can't we? I don't really understand the relevance of this testimony" (Id. at 1198). It was only when *the State Attorney* jumped in told the judge that he needed to listen to Nathanson's testimony and that the State had no objection did the court permit counsel to proceed (Id. at 1199). At the closing arguments, the court indicated that it needed from the State only the transcript of Dr. Marina's penalty phase testimony to review, as "it's just Doctor Marina who really creates an issue with the medical testimony I heard" (Id. at 1547). In light of the court's comments and the order itself, rendered 5 days after the hearing was concluded, it is apparent that no meaningful attempt to evaluate the fact-laden issues in this case was

At the hearing, Kassier also testified that he felt that Dr. Nathanson had "significantly less forensic experience" than Dr. Marina (PCR. 1184). If this was the reason for his failure to call Nathanson, it does not explain why he would call Dr. Azan, whose very first private forensic examination was of Ana Cardona, and whose testimony directly conflicted with the other testifying defense expert. Dr. Nathanson testified below that at the time of Ms. Cardona's trial, he was a clinical psychologist with extensive training in neuropsychology, had conducted between 50 and 100 forensic evaluations in Dade, Broward, and Monroe counties, and had been qualified in court to testify as an expert. There is no rational explanation that can survive constitutional scrutiny for counsel's decision.

The trial court's order also found that "*As far as defense's claim that the defendant is mentally retarded today,* all the evidence submitted to the Court flies in the face of such contention in that she has written lengthy letters in Spanish, that she knows her medication and has written to her doctors about her medication, and that she knows the names of the medication and the strengths of the medication. The assistant warden indicates that she communicates in English and that there is no indication of any mental retardation" (PCR. Supp. 935) (emphasis added). This finding is not only not supported by competent and substantial evidence, but it ignores the fact that whether Ms.

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made by the court.

Cardona is mentally retarded *today* is not the issue as to Ms. Cardona's penalty phase claim. None of the "evidence" referred to by the court was available at the time of the penalty phase.

In light of the one aggravator, the substantial information withheld by the State, the lack of a credible consistent mitigation case at the penalty phase, and the jury's narrow 8-4 recommendation, Ms. Cardona has established prejudice.

D. FAILURE TO PRESENT ABBOTT AVENUE DEFENSE AS MITIGATION. Counsel failed to adduce evidence at the penalty phase regarding the confessior of Gloria Pi. As detailed in Argument I, there was substantial evidence that Pi substantially contributed to the death of Lazaro Figueroa.

At the evidentiary hearing, Gainor testified that although he may have discussed presenting the Abbott Avenue evidence at the penalty phase with Kassier, he believed their failure to present the evidence at the guilt phase foreclosed the "tactic" of presenting the information to the jury at the penalty phase (PCR. 1053). On the other hand, Kassier testified that he did not recall any discussion with Gainor about use of the Abbott Avenue information at the penalty phase (Id. at 1110). Kassier's testimony was that the Abbott Avenue information was already available at the time he got involved in Ms. Cardona's case, and he did not recall personally doing any further discovery on the issue (Id.). Although he had given some consideratior to presenting the Abbott Avenue information at the penalty phase, "that was not my focus" (Id. at 1111).

The penalty phase "plan" that actually went forward was wholly inadequate and fatally flawed. It depended on residual doubt as to Ms. Cardona's ultimate guilt based on Kassier's impeachment of Gonzalez at the guilt phase (which, as explained in other sections of the brief was inadequate), and an unconvincing and inconsistent mental health

presentation. This was the "logical, straightforward explanation" that trial counsel claimed was the only explanation the jury might accept (Id. at 1055).

That Ms. Cardona was prejudiced by the failure to present any independent evidence of Pi's confession cannot be disputed in light of the State's examination of Dr. Marina. The failure to present any evidence on Pi's confession gave the State more ammunition to attack Dr. Dorita Marina's penalty phase testimony. During the State's cross-examination of Marina, she testified that Ms. Cardona told her that Olivia Gonzalez took Lazaro to a babysitter because Ms. Cardona could not take care of the children because she was too high on drugs (R. 3692). Marina also testified that Ms. Cardona told her that on the day Lazaro's body was abandoned on Miami Beach, Olivia told her that they were taking him to a baby sitter (Id. at 3690). The State asked Marina if Ms. Cardona had told her that "the mythical babysitter" hurt the child. Dr. Marina responded, "I don't know about implying with the baby sitter. She does say that Olivia hits her and she did say that. I don't remember her saying that the babysitter would hit the child" (Id. at 3691-92). Thus the State got a double advantage from the defense's failure to present this issue at the penalty phase--making Marina's testimony look even more incredible, and portraying Ms. Cardona as a liar shifting blame to the "mythical babysitter."
The fact that another individual confessed to killing Lazaro Figueroa

was significant information that the jury should have known about. This information would have been significant mitigation evidence in and of itself, and would also have established that the heinous, atrocious, or cruel aggravating circumstance did not apply beyond a reasonable doubt to Ana Cardona, or, at a minimum, would have lessened its weight. Alone and in conjunction with the other errors, Ms. Cardona submits that a resentencing is warranted.

E. FAILURE TO INTRODUCE GONZALEZ'S POLYGRAPH RESULTS. Gonzalez was polygraphed 3 times, and 3 times she failed (Defense Exhibits U, V; State's Exhibits 1, 2). The polygraph results and her complete statements to the polygraph experts should have been introduced at the penalty phase. Defense counsel never investigated the possibility of presenting this evidence at the penalty phase.

While polygraph evidence is generally inadmissible at the guilt phase, Ms. Cardona submits that it is admissible at the penalty phase. See Fla. Stat. § 921.141 (1) (1992). The Eighth and Fourteenth Amendments to the United States Constitution also forbid the *per se* exclusion of relevant evidence at a capital penalty phase. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986); Green v. Georgia, 442 U.S. 95, 97 (1979).

Recently, the Ninth Circuit concluded that the refusal to permit evidence that the State's key witness had failed a lie detector test resulted in a violation of a defendant's due process right to present

relevant mitigating circumstances of the crime. Rupe v. Wood, 93 F. 3d 1434, 1441 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997). Accord Paxton v. Ward, 199 F. 3d 1197 (10th Cir. 1999).[44] Ms. Cardona was similarly deprived of her right to present relevant mitigating evidence. At the guilt phase, Dr. Merry Haber was permitted to testify that Gonzalez was not malingering in her interviews to Haber (R. 3046-47). Not only would Haber's opinion have been effectively challenged as described in Argument I, but her testimony that Gonzalez was not malingering clearly opened the door at the penalty phase to the introduction of her 3 failed polygraphs. This is particularly true where the State urged the jury at the penalty phase to "remember" what Dr. Haber had told them about Gonzalez (R. 3750), and extolled the importance of Gonzalez to the case (R. 3761-62). Gonzalez's failed polygraphs would have been compelling mitigation on behalf of Ms. Cardona, and counsel unreasonably failed to investigate the issue and present the evidence.

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[44]Ms. Cardona is aware of the Supreme Court decision in United States v. Scheffer, 523 U.S. 303 (1998), where it held that a defendant's attempt in a court-martial proceeding to present polygraph results to support his testimony that he had not used drugs violated his right to present a defense. Scheffer, however, does not apply to a capital defendant's constitutional right to present mitigation. Paxton, 199 F. 3d at 1215. The Scheffer Court noted that its holding did not apply to situations where the exclusion of polygraph evidence "has infringed upon a weighty interest of the accused" or "implicate[s] a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents." Scheffer, 523 U.S. at 303-09. Thus, Scheffer supports Ms. Cardona's argument.

F. FAILURE TO OBJECT TO CONSTITUTIONAL ERROR. The jury was repeatedly instructed by the court that its role was merely "advisory" in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Counsel's failure to object was prejudicially deficient, and an evidentiary hearing is warranted.

ARGUMENT III--PUBLIC RECORDS

Numerous state agencies claimed exemptions from disclosure of records requested by Ms. Cardona and those exemptions were upheld by the trial court, in some cases following *in camera* inspection. A public records objections hearing was held on January 7, 1998, and included the Dade State Attorney, the Attorney General, Department of Corrections, Metro-Dade Police Department, City of Miami Beach Police, City of Miami Police, FDLE, the Department of Children and Families [DCF] (formally HRS), and the Dade Clerk's Office. The trial court upheld DOC's objection on relevancy grounds to providing any records beyond Ms. Cardona's medical files and denied Ms. Cardona access to any of the Department of Corrections files of 26 witnesses and co-defendant Olivia Gonzalez that had been requested through the public records process (PCR. 1595-96). Ms. Cardona submits that these records are relevant to investigating a Rule 3.850 case. The vast majority of the listed persons had been witnesses that were interviewed by the authorities, deposed or actually testified at the trial. Gathering the requested information is an important part of the discovery and

investigation portion of Ms. Cardona's case.

At the same hearing, the court denied access to any DCF records concerning Ms. Cardona's children who had been placed into foster care at the time of her arrest or concerning the guardian ad litem (PCR. 1635). During the hearing the trial court agreed to examine *in camera* over 1000 pages of material that the Office of the State Attorney claimed were not public records (PCR. 1692-93). The State described the material that the court reviewed as including public school records of Gloria Pi (the babysitter who confessed to the murder of Lazaro), printouts of unspecified abuse reports from Florida Protective Services, and state attorney notes. (PCR. 1690-91). The school records were exempt and not Brady material, according to the State, because Pi was not Ms. Cardona's child, "under the statute she can't get this person's juvenile school records" (PCR. 1690). The State also described the remaining 1000 pages of documents as including preliminary notes, deposition, notes, etc. Critically, however, notes concerning witness preparation were withheld (PCR. 1691-92). On January 14, 1998, the trial court entered an order denying access to Ms. Cardona to all the State Attorney files ordered them sealed for appellate review. (PCR. 543-44).

This Court must review these records, and particular importance should be paid to the notes of witness preparation that were withheld. During the evidentiary hearing, both of the trial prosecutors revealed

that Olivia Gonzalez spent several hours with them prior to her testimony (PCR. 921; 952). Ms. Campbell testified that she probably met in advance with State Attorney Investigator Maria Zerquera prior to the investigator's secret meetings with Olivia Gonzalez (PCR. 913-15). She also testified that she talked with the investigators after they interviewed Ms. Gonzalez (PCR. 918). If any of the withheld material consisted of notes or memorializations of these meetings with Ms. Gonzalez, the material would be Brady information disclosable to Ms. Cardona. In addition, the trial court refused to allow Ms. Cardona access to the personnel records of the prosecutors from the State Attorney's Office involved in Ms. Cardona's case and additionally refused to even undertake an *in camera* inspection of the personnel files (PCR. 1707-08). If a court is not going to disclose records, it must perform an *in camera* inspection.

At a public records on October 15, 1998, the State Attorney and an attorney representing the City of Miami Beach Police Department objected to turning over files on several witnesses related to the Cardona case (R. 1562-76). The witnesses included: Doris Couto, former girlfriend of Olivia Gonzalez; Eduardo Ortero; Jose Rosario; Jose Ventrano (one cases); Mr. Calderon (three cases); and Manuel Fleitas (two cases). The State's position articulated at the hearing was that as to the files of Couto, Ortero and Rosario that the files in question were not public records because the cases were open

investigations.[45] (PCR. 1568, 1570, 1571). The outstanding warrant on Ms. Couto was eleven years old (PCR. 1568). Based on the hearing transcript in appears that there were two files involving Ms. Couto, one an assault case and the other a petty theft case (PCR. 1569). Upon review the trial court found that the petty theft case had been nolle prossed and was no longer open (PCR. 1570). However, after an *in camera* inspection the court did not require the other files of Couto and Ortero to be provided to the defense by the Miami Beach Police (PCR. 1574). The State argued that the documents involving Jose Ventrano (one cases); Mr. Calderon (three cases); and Manuel Fleitas (two cases) were actually the prosecutors' "notes to themselves" and should be exempt from discovery. (PCR. 1573). Following a review of the documents, the trial court sustained the objections of the State, finding that the documents were not public records (PCR. 1574).

In addition, Ms. Cardona specifically requested information on the jurors in Ms. Cardona's trial pursuant to Buenoano v. State, 708 So. 2d 941 (Fla. 1998), from FDLE, Dade Clerk, and Dade State Attorney. Objections were heard at a hearing on April 30, 1999 (PCR. 766), and all objections were sustained (PCR. 770-76).

Counsel requests that this Court review all the sealed documents in light of the arguments herein, and to the extent that such

[45]Despite having claimed an exemption, after the State represented to the trial court that Mr. Rosario was deceased, the trial court ordered the State to turn over the Rosario files.

are disclosed, Ms. Cardona is entitled to amend her 3.850 motion.[46]

ARGUMENT IV--COMPETENCY

The lower court erred in summarily denying Ms. Cardona's claim that she was incompetent and that counsel failed to request a competency hearing.[47] There were indicia that Ms. Cardona was incompetent throughout the 2 year period leading up to her trial. These indicia should have alerted all counsel and the Court that competency was an issue. Dr. David Nathanson, appointed to examine Ms. Cardona for competency (among other things), detailed in his report that Ms. Cardona was "barely competent" to proceed,[48] and in fact her competency on several of the competency criteria was questionable. Ms. Cardona's appreciation of the range and nature of possible penalties was questionable because of her poor cognitive ability, and according

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[46]Following a review of the hearing transcripts and based on a review of the Index of the Record on Appeal and Supplemental Record on Appeal, certain documents that were to be sealed in the court file following *in camera* inspections by the trial court were apparently not transmitted by the Clerk of the Circuit Court with the Record in this case to this Court (See PCR. 543, 1565-66, 1616, 1654-55, 1681, 1692-93). A separate motion requesting such transfer will be filed with the Court.

[47]At the Huff hearing, the State argued that because Drs. Marina, Schwartz, Garcia and Jacobson all found Ms. Cardona to be competent, there had been no reason for a competency hearing prior to trial; the court then denied the claim without entering a written order (PCR. 834-39).

[48]Dr. Nathanson elaborated that "[i]f a point scale of 0-100 existed, based upon points awarded the six criteria on the competency to proceed to trial issue, with over 50 being the minimum acceptable score for competency, Ms. Cardona would receive a 50.5" (Defendant's Exhibit X).

to Dr. Nathanson, "[i]t is questionable whether she fully comprehends the potential for long-term incarceration or other penalties." Her understanding of the adversary process was also questionable, as was her capacity to disclose to her attorney facts pertinent to the proceedings. As to this latter criterion, Dr. Nathanson reported that "Ms. Cardona's inability to conceptualize beyond literal discussion of events in her case raises serious questions about her capacity to fully disclose enough information to help her attorney in the preparation of a defense." Her capacity to testify relevantly was likewise questionable because her "passive, infantile personality and her significant cognitive deficiency raises questions about her ability to testify with sufficient independence of judgment in a courtroom proceeding" (Defendant's Exhibit X).

Counsel failed in their duty to bring the issue of competency to the court's attention and to litigate the issue, and the Court failed in its duty to hold a competency hearing. Dr. Nathanson's findings, in addition to his diagnostic conclusions that Ms. Cardona suffered from organic brain damage and was mentally retarded, established the need for a competency hearing. Because no hearing was held, Ms. Cardona was tried and convicted while incompetent, in violation of the constitutional guarantee of due process. Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960). If doubt exists as to a defendant's competency, the court must hold a hearing.

Pate v. Robinson, 383 U.S. 375 (1966); James v. Singletary, 957 F.2d 1562 (11th Cir. 1992).

ARGUMENT V--INSANITY TO BE EXECUTED

Ms. Cardona is insane to be executed. Ford v. Wainwright, 477 U.S. 399 (1986). This claim is not ripe for consideration but must be raised for preservation purposes. Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998).

ARGUMENT VI-- INNOCENCE OF DEATH PENALTY

Based on the evidence at the evidentiary hearing and the arguments in this brief, Ms. Cardona has established that she is innocent of the death penalty. Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Scott v. Dugger, 604 So.2d 465 (Fla. 1992). One aggravating circumstance supports the death sentence in this case. However, the jury was not informed that there can be no vicarious liability for this aggravator circumstance; it must be Ms. Cardona and not Olivia Gonzalez who had the requisite mental state. It was not established beyond a reasonable doubt that Ms. Cardona was the individual who inflicted the fatal abuse to Lazaro Figueroa. In fact, Gonzalez told Brian Slattery that she was the person who killed Lazaro Figueroa. The jury, however had no independent evidence of Gonzalez's confessions. Because Ms. Cardona does not meet the eligibility requirement, she is innocent of the death penalty.

CONCLUSION

Ms. Cardona submits that relief is warranted in the form of a new trial and/or a resentencing proceeding. To the extent that relief is not granted on issues on which the lower court did rule, Ms. Cardona requests that the case be remanded so that full consideration can be given to her other claims.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 20, 2001.

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